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MEDICAL MEN AND THE LAW

A MODERN TREATISE ON THE LEGAL RIGHTS DUTIES AND LIABILITIES OF PHYSICIANS AND SURGEONS

BY

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OF THE OHIO AND NEW YORK BARS; CONTRIBUTING EDITOR TO THE LANING OHIO, "ENCYCLOPÆDIC DIGEST;" "NOTES ON THE AMERICAN DECISIONS AND REPORTS," AND MANY OTHER LEGAL PUBLICATIONS

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TO MY FATHER

ELIHU CULBERTSON, M.D.

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PREFACE

THE title of the book shows what it is, or at least what it is intended to be. I have endeavored to deal with all the main features in the modern law pertaining to physicians and surgeons. Obviously, it is not intended in any way to interfere with existing text-books known under the title of medical jurisprudence, but rather to supply the want, which many other persons have long felt, of a work of this character. By careful selection it has been found possible to give all that is of substantial present importance within a volume of moderate size. I hope that, written on these lines, the book may be useful to physicians and surgeons, and that it may not be unacceptable to many lawyers.

H. E. C.

LOUDONVILLE, OHIO.

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MEDICAL MEN AND THE LAW

CHAPTER I

INTRODUCTORY

It has been our object in this work not merely to show that, in common with all mankind, medical practitioners should have some general knowledge of the law, without which they cannot in any scene of life discharge properly their duty either to the public or to themselves, but also to demonstrate, that there are many and intricate branches of the law, in which the physician or surgeon, by competent knowledge, may not only materially serve himself in reputation, and his patients by advice, but also render important benefit to the community. It is true that medical practitioners, for reasons hereafter stated, are exempt from serving on juries, and are seldom charged with magisterial duties; but can they restrain unlicensed intruders, or punish the bad practices of ignorant pretenders, without some study of the law? Can they vindicate their rights without reference to the numerous acts of the legislature on which they are founded? Can they prove the guardians of the public health without knowing the enactments by which it is protected? Can they advise the legislative or executive power on numerous points submitted to their consideration without understanding the bearings of the question referred to them? Can they

successfully suppress malpractice suits when they are ignorant of what the law requires of them in regard to the skill and care to be exercised?

Historical Survey.—From remote times the practice of medicine has been regulated by law, to greater or less extent, with occasional intervals of reaction caused by class effort, to use the public statute for private gain, as when the House of Lords, reversing the law courts,[1] and deciding that apothecaries might prescribe drugs, made the apothecary the general medical practitioner of England. Centuries before this, however, the monks and the clergy in England had almost exclusive control of the practice of medicine and surgery. In 1163 the Council of Tours enacted that no clergyman or monk should undertake any bloody operation, and from that time the clergy confined themselves to prescribing medicines, and the practice of surgery fell into the hands of the barbers, whose shops were marked by a striped pole and a basin; the fillet around the pole indicating the ribbon for bandaging the arm in bleeding, and the basin the vessel to receive the blood.

In 1540, by Act of Parliament, the incorporated companies of barbers and surgeons were united. This union was dissolved in 1745, with the result that the barbers were ousted and that the surgeons survived. Modern medical practice cannot be said to have properly commenced in England until the beginning of the sixteenth century, and promptly in 1511 was passed the first statute for regulating the medical profession, that of 3 Henry VIII, cap. 2, the preamble of which informs us that "ignorant persons, who could tell no letters on the book, and common artificers, smiths, weavers, and women, who took

[1] Rose *v.* The College of Physicians, 3 Salk, 17; 6 Mod., 44.

upon themselves great cures, partly using sorcery and witchcraft, partly applying very noxious medicines to the diseases," were then practising medicine and surgery.

By the statute of Henry, the profession was for the first time divided into physicians and surgeons. It also enacted, under a penalty, that "no physician or surgeon shall practise in London, or within seven miles of it, without examination by the Bishop of London, or the Dean of St. Paul's, and four doctors of physic; nor out of the city, or precinct, but if he be first examined and approved by the bishop of the diocese, or his vicar general, calling to them such expert persons in the same faculty as their discretion shall think convenient."

In 1560 surgery was declared a part of physic, and the practice thereof thrown open to all the company or fellowship of physicians.[1] Numerous Acts of Parliament have been passed touching the medical profession since the days of Henry VIII. One under James I to prevent Popish recusants practising physic, or using or exercising the trade or art of an apothecary; another under William and Mary for exempting apothecaries from serving as constable or scavengers; another for exempting spirits and liquors used by physicians in the preparation of medicine from duty, and scores of others, including the Medical Act of 1858, as amended by 22 Vict.

Our ancestors on this side of the Atlantic, in the year 1649, when physicians were few and quacks were numerous, endeavoring to guard against the folly and presumption of ignorant practitioners, passed the following ordinance: "For as much, as the law of God allows no man to impair the life or limbs of any

[1] 32 Henry VIII, cap. 40.

other, but in a judicial way, it is, therefore, ordered, that no person or persons whatsoever, employed at any time about the bodies of men, women, and children, for the preservation of life or health, as surgeons, midwives, physicians, or others; presume to exercise or put forth any act contrary to the known approved rules of the art, in each mystery and occupation; nor exercise any force, violence, or cruelty upon or toward the body of any, whether young or old (no not in the most desperate and difficult cases) without the advice and consent of such as are skilful in the same art (if such may be had), or at least some of the wisest and gravest there present, and consent of the patient or patients, if they be *mentis compotes*, much less contrary to such advice and consent; upon such, severe punishment, as the nature of the fact may deserve—which law nevertheless is not intended to discourage any from all lawful use of their skill, but rather to encourage, and direct them in the right use thereof; and inhibit and restrain the presumptory arrogancy of such as through perfidence of their own skill, or any other sinister respects, dare boldly to attempt to exercise any violence upon or toward the bodies of young or old, one or other, to the prejudice or hazard of the life or limb of man, woman, or child."[1] Thus from time to time not only have the law-making departments of the countries across the sea enacted laws for the protection of society against the quack and the unqualified, but the legislatures of the several States have, under their right to provide for the public welfare, passed laws regulating the practice of medicine.

Law in General.—Law, in its widest sense, is a rule of action, prescribed by a superior and which

[1] Old Colony Laws, p. 28.

the inferior is bound to obey. Law, in its technical sense, is a rule of civil conduct, prescribed by competent political authority, commanding certain things as necessary to, and forbidding other certain things as inconsistent with, the peace and order of society.[1]

International and Municipal Law.—Law, in this latter sense, is of two kinds, international and municipal. International law is that rule of civil conduct which is prescribed by the common consent of Christian nations, and regulates their intercourse with one another. Municipal law is that rule of civil conduct which is prescribed by the supreme power in a State, and regulates the intercourse of the State with its subjects and of those subjects with each other.[2]

AMERICAN MUNICIPAL LAW.—As to its object, this is of two kinds, Federal and State. Federal law is that rule of civil conduct which is prescribed by the supreme power in the United States, and regulates, in matters of a national character, the intercourse of the federal government with the people, and of the people with each other or with citizens of foreign States. State law is that rule of civil conduct which is prescribed by the supreme power in each individual State, and regulates, in all matters not of a national character, the intercourse of such State with its own people and of its people among themselves.

Unwritten and Written Law.—American municipal law is, as to its origin, of two kinds, unwritten and written. Unwritten law (known also as common law) is that rule of civil conduct which originated in the common wisdom and experience of society, in time became an established custom, and has finally

[1] Blackstone Comm., pp. 38–44.
[2] Kent Comm., i, pp. 1–4.

received judicial sanction and affirmance in the decision of the courts of last resort. Written law is that rule of civil conduct which has been prescribed directly, in so many words, by the supreme power of the State itself.

The United States, as such, has no common or unwritten law; and when its courts are called upon to administer the principles of that law, they are guided by it as it exists in the State where the cause arose. In Louisiana the Roman or Civil Law is the source and depository of unwritten law. In the other States the courts have assumed, or the legislatures or constitutions have declared, the written and unwritten law of England, as it existed at the Revolution, to be the common law of such States, so far as it was applicable to the situation of their people.

The written law of the United States consists of the Federal Constitution, the Acts of Congress, and the Treaties made by its authority. The written law of the individual State consists of its Constitution and its Statutes.[1]

The Law and Health.—The law protects health:[2] (1) By giving to the party, whose health is endangered, the right to remove the cause of danger, whenever this can be done without disturbing the public's peace; (2) by punishing, as criminal offences, those actions or omissions which endanger health; (3) by giving compensation to the injured person in a suit at law; (4) by compelling the person, in whose actions or omissions the cause of danger has originated to remove it.

[1] Robinson's Elementary Law, pp. 2, 5.
[2] Ibid., p. 17.

CHAPTER II

DEFINITIONS

Physicians.—A physician is defined[1] to be a person who has received the degree of Doctor of Medicine from an incorporated institution; one lawfully engaged in the practice of medicine. This definition does not confine the class to those who have graduated at a medical college, but includes, as well, all who are lawfully engaged in the practice of medicine, whether graduates or not. The word in its popular sense means "one who professes or practises medicine, or the healing art, a doctor."[2] "Doctor," "person practising medicine," and "physician" are often used as synonymous and interchangeably.[3] Other definitions of physicians are: "One authorized to prescribe remedies for and treat disease; a doctor of medicine;"[4] "one who practises the art of healing disease and preserving health; a prescriber of remedies for sickness and disease;"[5] "one qualified and authorized to prescribe remedies for diseases;"[6] "one who is versed in medical science, a branch of which is surgery."[7] The statutes of a great many States

[1] Bouvier, Law Dict. (quoted in Harrison *v.* State, 102 Ala., 170; 15 So., 563; William Laurie Co. *v.* McCullough, 90 N. E., 1018).

[2] Worcester Dict. (quoted in Harrison *v.* State, 102 Ala., 170, 173; 15 So., 563; Whitlock *v.* Com., 89 Va., 337; 15 S. E., 893).

[3] Harrison *v.* State, 102 Ala., 170, 172; 15 So., 563.

[4] Webster Dict. (quoted in Sutton *v.* Facey, 1 Mich., 243; State *v.* McMinn, 118 N. C., 1259, 1261; 24 S. E., 5237).

[5] State *v.* Beck, 21 R. I., 288, 291; 43 Atl., 366.

[6] Prowitt *v.* Denver, 11 Colo. App., 70; 52 Pac., 286, 287.

[7] 102 Minn., 346, 351; 113 N. W., 690.

have defined who are to be recognized as physicians or surgeons. A physician or surgeon is defined by statute, in Arkansas, to be one who prescribes or administers medicine for, or in any manner treats, diseases or wounds for pay. Osteopaths[1] and homeopaths[2] are included in the term "physicians," but dentists[3] are not; neither does a physician's license cover the practice of dentistry.[4] There are a few cases, however, which hold that dentistry is a department of the medical art. In State *v.* Beck, 21 R. I., 288, the court recognized it as a branch of surgery. Magic healers or those who profess to heal the sick by magic, psychic, or supernatural agency may be impostors, but they are not physicians.[5] An orthopedist[6] who has not received a physician's license is not a physician.

Consulting Physician.—"A physician who consults with an attending practitioner required in cases of disease" is held to be a consulting physician.[7]

Surgeons.—A surgeon is a physician who treats bodily injuries and ills by manual operations and the use of surgical instruments and appliances.[8]

Dentists have been held not to be surgeons by the highest courts of some States.[9] Some courts have held that dentistry is a branch of surgery, holding

[1] Bandel *v.* Health Department, 193 N. Y., 133.

[2] Corsi *v.* Maretzek (N. Y.), 43 D. Smith, 1, 7; Raynor *v.* State, 62 Wis., 289; 22 N. W., 430.

[3] People *v.* Phippin, 70 Mich., 6; State *v.* Fisher, 119 Mo., 344; 24 S. W., 167; State *v.* McMinn, 118 N. C., 1259; 24 S. E., 523.

[4] City of Cherokee *v.* Perkins, 118 Ia., 405; State *v.* Taylor, 106 Minn., 218, 118 N. W., 1012; State *v.* Beck, 21 R. I., 288; 43 Atl., 366.

[5] Richardson *v.* State, 47 Ark., 562; 2 S. W., 187.

[6] William Laurie Co. *v.* McCullough, 90 N. E., 1014.

[7] U. R. Ry. Co. *v.* Graddy, 25 Neb., 854 (quoting Dunglison).

[8] Goss *v.* Goss, 102 Minn., 346, 351; 113 N. W., 690.

[9] People *v.* De France, 104 Mich., 563; 62 N. W., 709; State *v.* Fisher, 119 Mo., 344; 24 S. W., 167.

that a dentist is a dental surgeon.[1] In England,[2] a surgeon is a practitioner who holds a diploma from the Royal College of Surgeons, but who has not the degree of M.D.

Specialists.—A specialist, as the term is here used, is understood to mean a physician or surgeon who applies himself to the study and practice of some particular branch of his profession.[3]

Itinerant Physicians and Surgeons.—Itinerant physicians and surgeons are persons who in some form, or following some school, practise either medicine or surgery, or both.[4]

Osteopaths.—Osteopathy is defined as "a method of treating diseases of the human body, without the use of drugs, by means of manipulations applied to various nerve centres, chiefly those along the spine, with a view to inducing free circulation of the blood and lymph, and an equal distribution of the nerve forces."[5] The practice of osteopathy consists principally in rubbing, pulling, and kneading with the hands and fingers certain portions of the body, and flexing and manipulating the limbs of those afflicted with disease, the object being to remove the cause or causes of trouble.[6] "Osteopathy" teaches neither therapeutics, materia medica, surgery, nor bacteriology, but rests entirely upon manipulation of the body for the cure of disease.[7] In some States, New York for example, doctors of osteopathy are made physicians by statute.

[1] State *v.* Beck, 21 R. I., 288. [2] Standard Dict.

[3] Baker *v.* Hancock, 29 Ind. App., 456.

[4] City of Cherokee *v.* Perkins, 118 Iowa, 405.

[5] Annual Encyclopedia for 1900, p. 554 (quoted in Parks *v.* State, 159 Ind., 211, 229; 64 N. E., 862).

[6] Little *v.* State, 60 Nebr., 749, 751; State *v.* Gravett, 65 Ohio St., 289.

[7] Nelson *v.* State Board of Health, 22 Ky. Law Rep., 438, 441; 57 S. W., 504; 108 Ky., 769.

Midwifery.—Although childbirth is not a disease, but a normal function of women, the practice of medicine does not appertain exclusively to disease, and obstetrics as a matter of common knowledge has long been treated as a highly important branch of the science of medicine.[1] The midwife is a female obstetrician.[2]

Ophthalmology. — Ophthalmology is the science which treats of the physiology, anatomy, and diseases of the eye.[3]

Oculist.—An oculist who treats diseases of the eye comes within the provision of a statute prohibiting the practice of medicine or surgery without a license.[4]

Optician.—An optician is usually understood to be a person who manufactures, sells, repairs, and dispenses instruments for the strengthening and preservation of the human eye, and who does not treat disease or operate surgically.[5] An optician who merely fits glasses to the eyes of his customers, without giving medical or surgical treatment, is not within the purview of a statute against the practice of medicine or surgery by unlicensed persons.[6]

Optometry.—Optometry has been defined by the Utah statutes to be the employment of subjective and objective mechanical means to determine the accommodative and refractive conditions of the eye and the scope of its functions in general, and the application and adjustment of lenses for the correc-

[1] People *v.* Arendt, 60 Ill. App., 89; Com. *v.* Porn, 196 Mass., 326.
[2] Com. *v.* Porn, 196 Mass., 326.
[3] State *v.* Yegger, 19 S. D., 224; 103 N. W., 17.
[4] Com. *v.* St. Pierre, 175 Mass., 48.
[5] O'Neil *v.* State, 115 Tenn., 436.
[6] Smith *v.* People, 92 Ill. App., 22.

tion of errors of refraction, the relief of eye-strain, and the aid of vision.[1]

Bone Setter.—A bone setter is one who professes and practises bone setting in dislocations and fractures, reducing sprains, swellings, and contractions of the sinews by friction and fomentation.[2]

Christian Science Defined or Explained.—In one of the late cases on this subject the court said: "What Christian Science is we do not know. The practice of it is referred to by its followers as treatment," and "if its followers call it treatment, they ought not to be heard to say that it is not."[3] Its adherents believe that matter has no existence except as a manifestation of mind; that the divine mind is all-controlling; that the human mind, by becoming clean and purified, can to a degree realize and employ the powers of the divine mind; that all sickness and bodily ills are merely a species of sin, error or evil, and exist only in the apprehension of the human mind, and are nowise phenomena of matter; that the divine mind has the same power to relieve one of such sin or error, manifested in the form of disease, as it has to expel any other unclean or evil thought, and that the human mind, if it can only so perfect itself as to partake in sufficient degree of the omnipotence of the divine mind, also will be able to throw off and rid itself of disease.[4] In the application for a charter by a Christian Scientist society, under the laws of Pennsylvania, the purpose was stated to be, "to establish and main-

[1] State *v.* Gibson, 108 Pac., 347.

[2] Hewitt *v.* Charier, 16 Pick (Mass.), 353.

[3] State *v.* Marble, 72 Ohio St., 29.

[4] Matter of Brush, 35 Misc., 695. The Supreme Court of Rhode Island, in the case of State *v.* Mylod, 20 R. I., 632, holds that the practice of Christian Science is not the practice of medicine.

tain a place of worship and to preach the Gospel according to the doctrines of Jesus Christ as found in the Bible and the Christian Science text-book, *Science and Health with Key to the Scriptures, by Mary Baker G. Eddy*. The master found that the church was an organization not only for the purpose of worship, but also to accomplish the cure of disease; that the fundamental principle of the teaching was that disease had no real existence and the universal remedy was to understand and believe that sickness had no reality; that the healers who engaged in the cure of disease by prayer were constituted by the readers at the different churches, and it was the common, but not universal, practice for them to receive compensation for their services.[1]

Magnetic Healing.—We have been unable to find any case holding that magnetic healing, so-called, is so far based on coördinated, arranged, and systematized knowledge that it can be termed a science, or that any considerable degree of instruction is a prerequisite to its prosecution, as it is actually practised by those whose knowledge does not go beyond the manifestation of the phenomena of magnetism. But it has been held that one holding himself out as a magnetic healer, and whose method of treatment is, at least in part, the method that medical practitioners sometimes employ, is engaged in the practice of medicine.[2]

Magic Healers.—Magic healers are those who profess to heal the sick by magic, psychic, or supernatural agency.[3]

[1] First Church of Christ, Scientist, Philadelphia, 11 D. R., 573.
[2] Parks *v.* State, 159 Ind., 225.
[3] Richardson *v.* State, 47 Ark., 562; 2 S. W., 187.

Hypnotism.—Hypnotism is a peculiar physiological condition excited by perverted action of certain parts of the cerebral nervous organs, and is not caused by any occult force emanating from the operator.[1] J. G. McKendrick, professor of the institute of medicine, University of Glasgow, in concluding his learned article on "Animal Magnetism" in the *Encyclopedia Britannica*, says: "Whilst all the phenomena cannot be accounted for, owing to the imperfect knowledge we possess of the functions of the brain and cord, enough has been stated to show that just in proportion as our knowledge has increased has it been possible to give a rational explanation of the phenomena. It is also clear that the perverted condition of the nervous apparatus in hypnotism is of a serious character, and therefore that these experiments should not be performed by ignorant empirics for the sake of gain or with a view of causing amusement." Hypnotism is defined by W. Xavier Sudduth, A.M., M.D., of Chicago, in an article on "Hypnotism and Crime," in 13 *Medico-Legal Journal*, 239, to be in its simpler manifestations a modified form of natural sleep artificially induced, but in its more complex form it compares with abnormal condition of sleep known as somnambulism.

[1] Parks *v.* State, 159 Ind., 211, 226; 64 N. E., 862.

CHAPTER III

WHO MAY PRACTISE MEDICINE AND SURGERY

1. CONSTITUTIONALITY OF STATUTES REGULATING THE PRACTICE OF MEDICINE

(*a*) **In General.**—It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest or, as is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society.

The power of the State to provide for the general welfare of society authorizes it to prescribe all such regulations as, in its judgment, will secure or tend

to secure them against the consequences of ignorance and in capacity as well as of deception and fraud. As one means to this end it has been the practice of different States from time immemorial to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific or otherwise, with which such pursuits have to deal. The nature and extent of the qualifications must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty.

It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which life and health depend, and requires not only a knowledge of the properties of vegetable and mineral substance, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal.

Everyone may have occasion to consult him, but comparatively few can judge of the learning and

skill which he possesses. Reliance must be placed upon the assurance given by his license issued by an authority competent to judge in that respect that he possesses the requisite qualifications.

Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified.

The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practise in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected.[1]

That in the exercise of its power to prescribe reasonable regulations upon the right to practise medicine, the legislature may require, as a condition of the right to practice, that the person shall procure a license, may

[1] Mr. Justice Field in Dent *v.* West Virginia, 129 U. S., 114.

Medical Statutes Held to be Valid Exercise of Police Power. United States—Dent *v.* West Virginia, 129 U. S., 114. *Arkansas*—State *v.* McCarry, 92 S. W., 775; Gosnell *v.* State, 52 Ark., 228; Thompson *v.* Lear, 77 Ark., 506. *California*—Ex parte McNulty, 77 Cal., 164. *Illinois*—Williams *v.* People, 121 Ill., 84; People *v.* Blue Mountain, 129 Ill., 370. *Indiana*—State *v.* Webster, 150 Ind., 616. *Kansas*—State *v.* Creditor, 44 Kan., 565. *Kentucky*—Driscoll *v.* Com., 93 Ky., 393. *Louisiana*—Allopathic State Board *v.* Fowler, 50 La. Ann., 1358. *Maryland*—Scholle *v.* State, 90 Md., 729. *Michigan*—People *v.* Reetz, 127 Mich., 87. *Minnesota*—State *v.* Medical Examiners, 34 Minn., 387. *Montana*—State *v.* First Judicial Dist. Ct. Dept., No. 2, 26 Mont., 121. *Nebraska*—Lincoln Medical College *v.* Poynter, 60 Nebr., 228. *Nevada*—Ex parte Spinney, 10 Nev., 323. *New Mexico*—In re Roe Chung, 9 N. M., 130. *New York*—People *v.* Fulda, 52 Hun., 65. *Ohio*—State *v.* Marble, 72 Ohio St., 26. *Pennsylvania*—Com. *v.* Wilson, 6 Pa. Dist., 628, 19 Pa. Co. Ct., 521; Com. *v.* Finn, 11 Pa. Super. Ct., 620. *Rhode Island*—State Board of Health *v.* Roy, 22 R. I., 538. *Texas*—Dowdell *v.* McBride, 92 Tex., 239. *Utah*—People *v.* Hasbrouck, 11 Utah, 291. *West Virginia*—State *v.* Dent, 25 W. Va., 1. *Wisconsin*—State *v.* Currens, 111 Wis., 431.

designate some officer or board to issue the license, and to determine whether an applicant possesses the qualifications required to entitle him to it; and may prescribe, so far as can be done by a general law, what qualifications shall be required, and how the possession of them by the applicant shall be ascertained—necessarily follows from the power itself. It is for the legislature, and not for the courts, to determine those things. The only limit to the legislative power in prescribing conditions to the right to practise in a profession is that they shall be reasonable—that is, whether the legislature has gone beyond the proper limits of its power the courts must judge. By the term "reasonable" we do not mean expedient, nor do we mean that the conditions must be such as the court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If a condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and especially if it appeared that it must have been adopted for some other purpose—such for instance as to favor or benefit some person or class of persons —it certainly would not be reasonable, and would be beyond the power of the legislature to impose.[1] Naturally the constitutionality of statutes regulating the admission of members of the medical profession has frequently been questioned and passed upon by the courts. So frequently have these statutes been challenged that we have contented ourselves

[1] State *v.* Vendersluis, 42 Minn., 129, 43 N. W., 789.

by citing the foregoing cases to the proposition, that it has universally been held that such statutes are a valid exercise of the police power of the state, infringing no provision of either Federal or State Constitutions, as to constituting a taking without due process of law, or as to interfering with vested rights, neither have they been held to violate the prohibition against ex post facto laws nor to grant exclusive privileges and emoluments or create monopolies and perpetuities in violation of the constitution, but have only been held invalid where they contained some special objectionable feature.[1]

Thus the legislature may recognize one school without recognizing all, if the recognition be in the exercise of the proper classification and for the public welfare, and not with a view to create a monopoly in the schools recognized, or a discrimination against other schools.[2] For example, permitting the licensing of osteopaths, while excluding mental healing, is not an unlawful discrimination which will render the statute void.[3] And an act regulating the practice of medicine is not void as discriminating against Christian Scientists in that it prescribes that anyone possessing certain qualifications may practise osteopathy, and does not make special provision for those who wish to practise Christian Science.[4] It has been held in a late Ohio case that a legislative enactment which discriminates against osteopathists by requiring them to hold diplomas from a college which requires four years of study, as a condition to their obtaining limited

[1] Hawker *v.* N. Y., 170 U. S., 189; Reetz *v.* Michigan, 188 U. S., 505; Meffert *v.* Racker, 195 U. S., 625; Decie *v.* Brown, 167 Mass., 290.

[2] Parks *v.* State, 159 Ind., 211; State ex rel. Kellog *v.* Currens et al., 111 Wis., 431; State *v.* Marble, 72 Ohio St., 21; Scholle *v.* State, 90 Md., 729.

[3] Parks *v.* State, 159 Ind., 211; 64 N. E., 862.

[4] State *v.* Marble, 72 Ohio St., 21; 73 N. E., 1063.

certificates which will not permit them to prescribe drugs or perform surgery, while not requiring such time of study from those contemplating the regular practice as a condition to their obtaining unlimited certificates for the practice of medicine and surgery, is as to such discrimination void, and compliance therewith cannot be exacted of those who practise osteopathy.[1] But the same court has held that a statute making the giving of Christian Science treatment for a fee a misdemeanor, is not an interference with the rights of conscience and of worship conserved by the Ohio Bill of Rights, section 7, and is not, on that ground, unconstitutional.[2] And it has been held in Massachusetts that no constitutional rights are infringed by including midwifery in the provisions of a statute requiring a license to practise medicine.[3]

(*b*) **Statutes Requiring Good Moral Character.**—The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may be safely trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished.[4]

As was said by the court in a Minnesota case: "The legislature has surely the same power to require, as a condition of the right to practise this profession,

[1] State *v.* Gravett, 65 Ohio St., 289.

[2] State *v.* Marble, 72 Ohio St., 21; 73 N. E., 1063.

[3] Commonwealth *v.* Porn, 196 Mass., 326.

[4] Hawker *v.* New York, 170 U. S., 189; Dent *v.* West Virginia, 129 U. S., 114, 122; Eastman *v.* State, 109 Indiana, 278; State *v.* Hathaway, 115 Mo., 36, 47; State *v.* Call, N. C., 28 S. E., 517; Wert *v.* Clutter, 37 Ohio St., 347.

that the practitioner be possessed of the qualifications of honor and good moral character, as it has to require that he shall be learned in the profession;"[1] and by the court in Thompson *v.* Hazen: "Its authors were careful that human health and life should not be exposed without some restraint, by being committed to the charge of the unprincipled and vicious. . . . It could not have been intended that persons destitute of the moral qualifications required should have the opportunity to enter professionally the families of the worthy and unsuspecting, and be admitted to the secrets which the sick chamber must often entrust to them."[2]

(*c*) **Exemptions of Consultants from Other States.**—In the majority of States statutes have been exacted expressly excepting legally qualified physicians and surgeons from other States from the operation of their License Laws, while in consultation with resident physicians.[3] These statutes have been held not to be unconstitutional as abridging the privileges and immunities of citizens of the United States or of the several States.[4]

(*d*) **Statutes Forbidding Soliciting of Patronage.**—The State may, under its police power, forbid drumming or the soliciting of patronage for any medical practitioner on the trains or at the depots of any common carrier in the State, without unconstitutionally restricting the liberty of citizens, or depriving them of the equal protection of the laws.[5] The courts in setting forth their reasons for so holding say: "A physician who has secured a patient by means of a

[1] State *v.* State Medical Examining Board, 32 Minn., 324.
[2] Thompson *v.* Hazen, 25 Maine, 104, 108.
[3] See the Medical Acts of the several States.
[4] France *v.* State, 57 Ohio St., 1.
[5] Williams *v.* State, 85 Ark., 464.

hired agent has paid out a certain sum to obtain his patient, and is under a strong temptation to put him through a course of treatment, whether he needs it or not, in order to get his money back and make a profit on his investment. And therein lies the danger to the public from such a practice."[1]

(*e*) **Statutes Authorizing a Professional Tax.**—The legislatures of the several States may confer upon the municipalities of the State the right to tax physicians practising therein, provided the constitution has not specially stipulated otherwise.[2] Village trustees may for the purpose of raising revenue lawfully enact an ordinance levying a tax upon the occupation of practising medicine within the village limits.[3] And it has been held that debt lies against the physician for the professional tax.[4] So too itinerant physicians are frequently required to pay an occupation tax.

(*f*) **Statutes Requiring a Report of Contagious Diseases.**—Statutes and ordinances imposing the duty upon a physician of reporting to the proper officer all cases of diseases dangerous to the public health, which they are called upon to treat have been held constitutional in nearly every instance.[5]

(*g*) **Statutes Requiring a Report of Births and Deaths.**—A statute requiring physicians to report to the proper official births and deaths which may come under their supervision, and imposing a penalty for a failure to do so is constitutional.[6]

(*h*) **Prohibiting the Practice of Medicine by Persons Convicted of a Felony.**—This is not to be regarded as

[1] Thompson *v.* Van Lear (Ark.), 92 S. W., 773.

[2] See statutes of the several States, also State *v.* Edmunds, 127 Iowa, 333; State *v.* Hibbard, 3 Ohio, 63.

[3] Dodge *v.* Guidinger (Nebr.), 127 N. W., 122.

[4] State *v.* Proudfit, 3 Ohio, 63.

[5] State *v.* Wordin, 56 Conn., 216; People *v.* Brady, 90 Mich., 459.

[6] Robinson *v.* Hamilton, 60 Iowa, 134.

the mere imposition of an additional penalty for the conviction, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming the appropriate evidence therefor.[1]

2. REQUIREMENTS FOR ADMISSION TO PRACTICE

(*a*) **In General.**—It not being our intention in writing this work to collate the various laws in the different States prescribing the qualifications necessary to entitle one to begin the practice of medicine and surgery within their respective States, we shall content ourselves by stating in a general way the qualifications prescribed by the majority of the States, leaving to the reader to ascertain for himself what the legislature in his own particular State has said and done in this regard. For as has been said by a noted jurist: "Some fool legislature might come along and repeal the contents of my book."

The majority of the States at the present time require the candidate for admission to practise to present a diploma from a medical college of good standing and to pass a satisfactory examination before a board of examiners. Many of these statutes specify the subjects on which the applicant for examination must be examined. And in some States the legislature has specified the length of the course of study in a medical college necessary to entitle the applicant to an examination. In other States a diploma from a medical college is not required, as in Arkansas and West Virginia, where the candidate needs only to pass a satisfactory examination. While in a few of the States the candidate has his choice of presenting

[1] Hawker *v.* New York, 170 N. S., 189.

an acceptable diploma or taking an examination; New Mexico furnishes an example of the latter class. Still other States are so lenient as to only require the applicant to hold a diploma from a medical college in good standing. It is common in laws regulating the medical profession and prescribing qualifications to be possessed by those entering upon them, to exempt those already engaged in them from showing any qualifications other than the fact that such persons are already so engaged or have been so engaged for a certain time. And it has been held that such a provision is not such a discrimination as violates any constitutional right of those seeking to enter the medical profession.[1] Penalties are imposed by these statutes, as a general rule, upon persons practising without having complied with the requirements of the statute. A medical board of examiners may prescribe reasonable rules and regulations for the conduct of its work.[2]

(*b*) **What Constitutes a School of Medicine.**—(1) *In General.*—To constitute a school of medicine it must have rules and principles of practice for the guidance of all its members as respects principles, diagnosis, and remedies, which each member is supposed to observe in a given case. Thus any competent practitioner of any given school would treat a given case substantially the same as any other competent practitioner of the same school would treat it. One school may believe in the potency of drugs and bloodletting, and another may believe in the principle *similia similibus curantur;* still others may believe in the potency of water, or of roots and herbs; yet each

[1] In re Christensen, 59 Wash., 320.

[2] Illinois State Board *v.* People, 123 Ill., 227; State *v.* Miller, 146 Iowa, 521; State *v.* Medical College, 60 Ohio St., 122; Barmore *v.* Board, 21 Or., 301; 28 Pac., 8; State *v.* Chittenden, 127 Wis., 468; 107 N. W., 500.

school has its own peculiar principles and rules for the goverment of its practitioners in the treatment of diseases.[1]

Where the law provides that the possession of a diploma of a reputable medical school or a medical school in good standing shall be a requisite to the issuance of a license by the Medical Board, such board undoubtedly has the power to decide what is a reputable medical college or a college in good standing. This is purely a matter within the discretion of the board and its decision as to whether or not a medical school is in good standing is final and cannot be reviewed by the courts unless there is evidence of a plain abuse of such discretion. The burden of proving that a medical school is "reputable" or "in good standing" is on the person applying for a license and resting his claim thereto upon a diploma issued by what he claims is a medical college in good standing.

Summing it all up in one sentence the applicant must bring himself within all the provision of the "Medical Act" in his State.

(2) *Osteopathy.*—Osteopathy is a school of practice distinct from other medical schools.[2] Where the Public Health Law provides that in order to obtain a license to practice osteopathy a person must be a graduate in good standing of a "regularly conducted school or college of osteopathy," it means that the school must be conducted in conformity with laws of the place where it is located and not merely that it holds regular sessions.[3]

(3) *Clairvoyance.*—Not so, however, with clairvoyance practice. True, the practice has but one mode

[1] Nelson *v.* Harrington, 72 Wis., 591; 40 N. W., 228.
[2] Wilkins' Admr. *v.* Brock & Rosselle, 80 Vt., 332.
[3] People ex rel. Scott *v.* Reid, 135 App. Div., 89.

of ascertaining what the disease is and the remedy therefor, viz., the voluntary going into a sort of trance condition, and while in such condition to give a diagnosis of the case and prescribe for the ailment of the patient thus disclosed. But the mode in which a physician acquires a knowledge of his profession has nothing to do with his school or practice. This is the difference between clairvoyant physicians as a class and the practitioners of a school or system of medical practice recognized in the general rule of professional ability above shown.[1]

(*c*) **Necessity of License or Certificate.**—As has been said before most of the States now require that a person desiring to practise medicine must apply for and receive a license or certificate from the State board of medical examiners. In former years no license or certificate was required of a person who undertook to practise medicine, but it became such an every-day occurrence that people who were afflicted with disease, purchased and swallowed all sorts of nostrums, because some quack had recommended it, that the public became concerned and this salutary legislation was enacted. A license and a certificate have been held not to be the same thing.[2] In some States a physician or surgeon must procure a license in each county where he practises.[3]

In Ege *v.* Commonwealth, 9 Atl., 171, a physician was found guilty of violating a statute that required physicians to register in the county "in which he or she resides or sojourns." The accused was registered in a certain county where he resided, but went at regular

[1] Nelson *v.* Harrington, 72 Wis., 591; 40 N. W., 228.
[2] Nelson *v.* State, 97 Ala., 79; 12 So., 421.
[3] Orr *v.* Meek, 111 Ind., 40; 11 N. E., 787.

intervals to another county for the purpose of seeing patients who had consulted him in the county of his residence and to attend patients who called upon him in the latter county for the first time.

A person may practice medicine without a license when acting gratuitously and in case of emergency in which the ordinary and qualified practitioners are not readily obtainable. But an emergency is not created by the fact that regular physicians have given up the case as incurable.[1]

Necessity of Prior Practitioners Securing License.— A person who has been practising medicine as a physician for a number of years without objection is not exempt from complying with legislation of a later date, making it a condition precedent to anyone's practising medicine that he should have been examined by a medical examining board and found to have the qualifications required by law for so doing.[2] Thus, one who had many years previously been engaged in the practice of medicine within a State, which he subsequently left, is not, upon returning to the State, deprived of a vested right by being required to comply with the registration law as a condition to resuming such practice, especially where his former practice had not been conducted in accordance with the laws of the State.[3]

Medical laws in Alabama, Idaho, Iowa, North Carolina, Kansas, Nevada, Ohio, Pennsylvania, Rhode Island, and Texas exempt from their operation those who have practised in the State for a prescribed time

[1] State *v.* Paul, 56 Neb., 369.

[2] Allopathic State Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1358; 24 So., 809; People *v.* Fulda, 52 Hun. (N. Y.), 65; State *v.* Gravett, 65 Ohio St., 289; 62 N. E., 325.

[3] State *v.* Davis, 194 Mo., 485; 92 S. W., 484.

previous to the passage of the act,[1] but the applicant must have been in practice at the time of the passage of the act,[2] and evidence that he had practised medicine prior to the passage is insufficient.[3] The medical acts of most of the States except from their operation those who may be called for a special case from another State.

(*d*) **Sufficiency of License.**—A license or certificate to practise must be indorsed and countersigned by the officer authorized by statute in order to be valid,[4] and it has been held that neither a certificate from a medical school in Prussia that the defendant had there passed a limited course of study, nor a commission, after examination therefor, as a medical officer in a regiment in the volunteer army, is a license from some chartered school, State board of medical examiners, or medical society.[5] But it has been held that the certificate or licenses granted by a de facto board of medical examiners, who were irregularly appointed, were sufficient to protect the physician to whom they were issued from prosecution for practising without a license.[6]

(*e*) **Who May Issue.**—The general assemblies and legislatures of the several States, having the authority

[1] *Alabama*—Harrison *v.* State, 102 Ala., 170. *Idaho*—State *v.* Cooper, 11 Ida., 219, 81 Pac., 374. *Iowa*—State *v.* Mosher, 78 Iowa, 321. *Kansas*—State *v.* Creditor, 44 Kan., 565. *Nevada*—Ex parte Spinney, 10 Nev., 323. *North Carolina*—State *v.* Hicks, 143 N. C., 689. *Ohio*—State *v.* Medical Board, 60 O. S., 21. *Pennsylvania*—Com. *v.* Gibson, 7 Pa. Dist., 386. *Rhode Island*—Paquin *v.* State Board of Health, 19 R. I., 365. *Texas*—Hilliard *v.* State, 7 Tex. App., 69.

[2] Sherburne *v.* Board of Examiners, 13 Idaho, 105; Hart *v.* Folsom, 70 N. H., 213.

[3] Hart *v.* Folsom, 70 N. H., 213; 47 Atl., 603.

[4] Brooks *v.* State, 146 Ala., 153; 41 So., 156; Nicholson *v.* State, 100 Ala., 132; 14 So., 746.

[5] People *v.* Fulda, 52 Hun. (N. Y.), 65.

[6] Brown *v.* People, 11 Colo., 109; 17 Pac., 104.

to require as a condition precedent to the right or privilege of one to practise medicine, that he should be subjected before doing so to a prior examination as to his qualifications and found and declared worthy and qualified, has the right to select the particular agency to whom should be delegated that duty.[1]

(*f*) **Authority of Medical Boards to Refuse License.**—Boards of medical examiners are usually empowered to refuse certificates to persons guilty of unprofessional or immoral conduct, but an applicant who has paid his fees and who possesses all the requisite medical qualifications cannot be denied a license without a hearing.[2]

(*g*) **Registration of License.**—The statutes of a great many of the States require that physicians and surgeons must register their license or certificate with some designated officer. These requirements are mandatory. Of course, these statutes usually make exceptions of physicians registered under a former law and vary in their provisions as to the place where and the officer with whom the license must be registered. Some provide that it shall be registered in the county where the person to whom it is issued resides, and some that it shall be registered in the county where he expects to practise. Registration after the time prescribed by the statute is useless as a defence to a prosecution under the act.[3] Under a statute requiring a physician to register in the county of his domicile, he must register in every county that he moves into; but under a statute similar to the New York statute, which requires one to be registered in a book kept in the clerk's office of the county where such practice

[1] Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1358.
[2] State *v.* State Medical Examining Board, 32 Minn., 324.
[3] Commonwealth *v.* Densten, 217 Pa., 423.

is to be carried on, a physician who is duly registered in and practising in one county is not required to register in another so that he may visit patients there.[1]

One whose registration is illegal because of unintentional mistake or omission, may validate the same by a subsequent legal registration from the date of the filing of the original. For example: A physician who, in consequence of the fact that the registration official did not have a book in which he could register, did not succeed in doing so, but who was called in to attend a patient, and did practise, can recover his fees therefor, it appearing that he registered so soon as the book was obtained by the clerk and as soon as by writ of mandamus the clerk could have been made to furnish the book of registry. The court in rendering the foregoing opinion gave for the reason for so holding that "the doctor's only remedy in this case was by mandamus to make the clerk furnish the book; but that would take time, and he could not have registered a moment sooner. Suppose he was needed to set a limb or to perform a surgical operation to save life, is he to wait on a neglectful clerk until he gets a book? We think not."[2]

Another example where failure to register a certificate or license according to law is not fatal, is where a physician files his certificate with the wrong official.[3]

It has been held in Pennsylvania that a medical register is a public record over which the court in charge of whose office it is put has summary power of correction or cancellation on its own motion or the suggestion of anyone.[4]

[1] Martin *v.* Kirk, 55 Hun. (N. Y.), 474.
[2] Parish *v.* Foss, 75 Ga., 439.
[3] Mayor of New York *v.* Bigelow, 13 Misc. (N. Y.), 42.
[4] In matter of Campbell, 197 Pa., 581.

(*h*) **Conclusiveness of Medical Board's Decision.**—The laws of the several States on this subject usually contain a provision authorizing, either an appeal or by way of review, from the decision of the medical board in refusing or in revoking licenses to practise.[1] When the right to appeal is granted in "all cases of the refusal or revocation of a certificate by the medical board, the right exists as well where a certificate to practise medicine has been refused for incompetency as where it has been refused for unprofessional or immoral conduct. The law usually provides the manner of taking this appeal, but failure to do so does not affect the right.[2]

The statute of Rhode Island expressly provides for an appeal from the decision of a State board of health to the appellate division of the State Supreme Court upon the revocation of a license. This is held to provide due process of law, though no trial by jury could be secured under it.[3] Mandamus is the remedy when a board of examiners arbitrarily refuse an application for a certificate to practise,[4] or to compel the issuance of a license.[5]

(*i*) **Authority to Revoke License.**—The State, in the exercise of its police power, in the interest of the health, good government, general welfare, and morals of the people, may prescribe the qualifications of persons desiring to practise medicine, and may create a board whose duty it is to hear and determine any complaint made against any person holding a physician's license, and revoke such license for any cause provided for in the statute; such board while so act-

[1] See the statutes of the several States.
[2] State *v.* Dist. Ct., 19 Mont., 501; 48 Pac., 1104.
[3] State Board of Health *v.* Roy, 22 R. I., 538; 48 Atl., 802.
[4] Harding *v.* People, 10 Colo., 387.
[5] People *v.* Reid, 135 App. Div., 89.

ing is not a judicial tribunal, and is not governed by the technical rules applicable to law courts. In the absence of fraud, corruption, or oppression the findings of the board are conclusive upon the court.[1]

The authority of a State medical board to grant or refuse license to applicants is quasi judicial, involving the exercise of judgment and discretion;[2] therefore being authorized by statute it cannot be prevented by a writ of prohibition.[3]

(*j*) **Grounds for Revocation of License to Practise.**—(1) *In General.*—The right to practise the profession of medicine, when regularly obtained by compliance with the law, becomes a valuable privilege or right in the nature of property, and is safeguarded by the principles that apply in the protection of property lawfully acquired, and these are of the same general nature, though not in all particulars, as those which safeguard one prosecuted for the commission of a minor offence.

The police power of every State warrants the requirements of the possession of all reasonable qualifications by those who seek to engage in the public practice of medicine, and, incidentally, the extension of a wide discretion to those agencies charged with the duty of inquiry and determination; but the exercise of the same wide discretion cannot be extended to a case where, when one has been regularly admitted, the revocation of his license is sought under another and independent provision of the statute.[4] In some of

[1] Meffert *v.* Packer, 66 Kan., 710; affirmed in 195 U. S., 625; State *v.* Medical Examiners, 34 Minn., 387; 26 N. W., 126.

[2] People *v.* Illinois State Board of Examiners, 110 Ill., 180; Meffert *v.* Packer, 66 Kan., 710; 72 Pac., 247; Brown *v.* Grenier, 73 N. H., 426; 62 Atl., 590; People *v.* Reid, 135 App. Div., 89.

[3] State *v.* State Board of Medical Examiners, 34 Minn., 387.

[4] Czarra *v.* Board of Medical Supervisors of District of Columbia, 25 App. D. C., 443.

the statutes the grounds on which the license may be revoked are specifically set out in the statute. In others the grounds of revocation are not set out in detail, but it is provided that it may be revoked for unprofessional conduct.

(2) *Unprofessional or Dishonorable Conduct.*—"Unprofessional and dishonorable conduct," for which a statute authorizes the revocation of a license that has been regularly obtained, is not defined by the common law, and the words have no common or generally accepted signification. What conduct may be of either kind remains, as before, a mere matter of opinion. In the absence of some specification of acts by the law-making power, which is alone authorized to establish the standard of honor to be observed by persons who are permitted to practise the profession of medicine, it must, in respect of some acts at least, remain a varying one, shifting with the opinions that prevail from time to time in the several tribunals that may be called upon to interpret and enforce the law. As was said by the Supreme Court of the United States in a case involving the same principle, the question must be reduced to one of fact, as contradistinguished from mere opinion.[1]

Thus so much of an act of Congress as authorized the Board of Medical Supervisors of the District of Columbia to revoke the license of a medical practitioner upon conviction of "unprofessional or dishonorable conduct" independently of other offences for which a license may be revoked was held void for uncertainty,[2] and likewise a statute in Kentucky authorizing the State Board of Health to revoke a physician's license for grossly unprofessional conduct

[1] American School of Magnetic Healing *v.* McAnnulty, 187 U. S., 94.
[2] Czarra *v.* Board of Medical Supervisors, 25 App. D. C., 443.

likely to deceive or defraud the public, without fixing any standard by which such fact should be determined was held void.[1] It has been held in State *v.* Medical Board, 32 Minn., 324, that "unprofessional" means "dishonorable" and does not refer to matters of professional ethics only; and that a mere breach of professional ethics, such as advertising, etc., is not ground for revoking a license.

(3) *Procuring Abortions.*—If "the procuring, or aiding or abetting in procuring, a criminal abortion" is not "unprofessional or dishonorable conduct" in one holding a certificate entitling him to practise medicine then we are unable to conceive of any conduct of which such person might be guilty which could be called unprofessional or dishonorable.[2]

(4) *Gross Immorality.*—The revocation of the license of a person to practise medicine and surgery on the ground of immorality has been held valid under a statute prescribing the qualifications of a physician, and prescribing the grossly immoral, and authorizing the cancellation of any certificate issued to such persons;[3] and a statute authorizing a medical board to revoke a physician's license when the holder has been guilty of a felony or of gross immorality does not violate the provisions of the State or Federal Constitutions.[4]

(5) *False Statements and Promises.*—Statements and promises with reference to the treatment and cure of the sick and afflicted which are calculated to deceive and mislead the public constitute unprofessional and dishonorable conduct.[5]

[1] Mathews *v.* Murphy, Ky. App. Rep., 1901.
[2] Munk *v.* Frink (Neb.), 116 N. W., 525.
[3] Meffert *v.* Medical Board, 66 Kan., 710.
[4] Spurgeon *v.* Rhodes, 167 Ind., 1; 78 N. E., 228.
[5] People *v.* McCoy, 125 Ill., 289.

A physician is guilty of disgraceful conduct authorizing the erasure of his name from the medical register where he accepts money from those in the last stages of consumption, under the representation that they are suffering from catarrhal bronchitis, when he must have known the truth.[1]

(6) *Advertising.*—Extensive advertising by a physician cannot of itself be said to be disgraceful conduct, but where such advertisements are studied efforts to impose upon the credulity of the public for gain they are utterly disgraceful within the meaning of a statute providing for an erasure of physicians, names from the medical register where they are guilty of misconduct.[2] An advertisement which asserts to the public ability speedily to cure all chronic, nervous, blood, and skin diseases of both sexes, also diseases of the eye and ear, without injurious drugs or hindrance from business; all old lingering constitutional diseases, where the blood is impure, causing ulcers, blotches, sore throat and mouth, pains in the head and bones, cured for life, etc., has been held to be unprofessional conduct of the grossest kind.[3] Publishing broadcast the symptoms of catarrh is not conduct disgraceful in a professional respect.[4]

(7) *Distributing Indecent and Obscene Printed Matter.*—The conviction of a physician of distributing obscene and indecent printed matter in the District of Columbia has been held to be sufficient ground for the revocation of his license by the board of Medical Supervisors under an Act of Congress investing such board with the power to revoke licenses for sufficient cause.[5]

[1] In re Washington, 23 Ont. Rep., 299. [2] Ibid., 299.
[3] State *v.* State Board of Medical Examiners, 34 Minn., 391.
[4] In re Washington, 23 Ont., 299.
[5] Czarra *v.* Board of Medical Supervisors, 25 App. D. C., 443.

(8) *Fradulent Use of Diploma.*—A physician who obtains a certificate from the State Board of Health by the fraudulent use of a diploma issued to a different person is guilty of "grossly unprofessional conduct" of a character likely to deceive or defraud the public.[1]

(9) *Concealing a Fetus.*—"The revocation of a physician's license for unprofessional, dishonorable, and immoral conduct cannot be sustained upon a complaint which merely charged that on a given date the defendant placed in a furnace a headless fetus, about seven months old, with intent to destroy the same and conceal its birth; and that at the coroner's inquest over such fetus he testified that the child was the result of a miscarriage, its head having become detached in delivery; that he would not disclose the mother's name, as she had requested him not to make it known, and that he had been advised that he need not disclose it; that he withheld it, not through fear of incriminating himself, but to avoid the publicity it would give the mother, but that he would give her name to the coroner the next day, who could use his discretion in the matter, while upon the next day he refused to give her name upon the ground that she had left the State, and without her presence to explain her condition at the time his answer might incriminate him, since neither the attempt to burn the fetus nor the refusal to disclose the mother's name was of necessity either unprofessional, dishonorable, or immoral, but both were acts as consistent with innocence as with guilt."[2]

(*k*) **Proceedings to Revoke License.**—Where the proceedings to revoke a physician's license for unpro-

[1] State Board of Health *v.* Roy, 22 R. I., 358.
[2] State *v.* Kellogg, 14 Mont., 426.

fessional and dishonorable conduct are had before a State board of medical examiners, or other quasi-judicial body, the allegations of the complaint are not construed as strictly as they would be in an action before a regularly constituted court; but even in such cases the license will not be revoked unless the complaint sets forth facts which constitute an offence.[1]

(*l*) **Good Moral Character.**—A State may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such an one the right to practise medicine, and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of the requisite good character.[2]

(*m*) **Proof of Diploma.**—An applicant for a certificate to practise medicine and surgery who possesses a diploma must furnish to the examining board satisfactory proof of having received such diploma from a legally chartered medical institution in good standing,[3] and a diploma is not itself evidence of that fact.[4]

To prove a diploma given to a physician by a medical college of another State, the legal existence of the college must be produced.[5] The burden of proving that a medical school is reputable or in good

[1] State *v.* Kellogg, 14 Mont., 426.

[2] Eastman *v.* State, 109 Indiana, 278; State *v.* Hathaway, 115 Mo., 36, 47; Hawker *v.* New York, 170 U. S., 189; State *v.* Call, N. C., 28 S. E., 517; Wert *v.* Clutter, 37 Ohio St., 347; Dent *v.* West Virginia, 129 U. S., 114, 122.

[3] State *v.* Gregory, 83 Mo., 123.

[4] Hill *v.* Boddie, 2 Stew and P. (Ala.), 56.

[5] Hunter *v.* Blount, 27 Ga., 76.

standing is on the applicant, the board having the right to ascertain whether the college issuing the diploma was authorized by law to do so.

3. WHAT CONSTITUTES PRACTISING MEDICINE OR SURGERY

(*a*) **In General.**—In the absence of a statutory definition the words "practising medicine and surgery" must be taken to have a meaning in their ordinary sense. Medicine, in its ordinary sense, as applied to human ailments, means something which is administered, either internally or externally, in the treatment of disease, or the relief of sickness. It may be applied externally and it need not necessarily be a substance which may be seen or handled. It may consist of electricity conveyed by instruments or the human hand. And he whose profession it is to prescribe and administer this, after diagnosticating the complaint, is a physician as commonly and ordinarily understood.[1]

One may be convicted of prescribing and furnishing medicines for the sick without a license, if he assures the public of his ability to cure their diseases, and if upon their applying to him, after diagnosticating the case, he selects a remedy which he calls a tissue food and sells it, with directions for its use; and the fact that the substance given may have some value as a food is immaterial.[2]

One who recommends and offers for sale an instrument or device called "oxygenor," which is claimed to generate oxygen gas and introduces it into the body

[1] Springer *v.* District of Columbia, 23 App. Cas., 59; Kansas City *v.* Baird, 92 Mo. App., 284.

[2] State *v.* Breese, 137 Iowa, 673; 114 N. W., 45.

of the user, is not engaged in the practice of medicine, within the meaning of an act regulating the practice of medicine, and applicable to any person who treats, or professes to treat, operate on, or prescribe for, any physical ailment or injury to or deformity of another.[1]

One making a business of fitting spectacles and inviting persons afflicted with certain troubles due to defective sight to call upon him, but who states that he does not give medical or surgical treatment, has been held not to be engaged in the practice of medicine within the meaning of the Illinois statute.[2]

(*b*) **Osteopathy.**—Whether or not a person giving osteopathic treatment is to be regarded as practising medicine usually depends upon the breadth of the definition given the particular statute to the term "practising medicine." Thus in those States where the statute or the courts confine the definition to the mere administration of drugs or the use of surgical instruments it has been held that an osteopath is not within the statute.[3] Osteopathy has been held not to be an "agency" within the meaning of an act to regulate the practice of medicine, which forbids the prescribing of any drug or medicine or other agency for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualification.[4] Nor is an osteopath within a statute defining any person as engaged in practising medicine or surgery who shall, for a fee, prescribe, direct, or recommend for the use of any person, any drug or medicine or

[1] People *v.* Lehr, 196 Ill., 361; 63 N. E., 725.

[2] State Board of Health *v.* Smith, 20 Ill., 31; 69 N. E., 810.

[3] *Kentucky*—Nelson *v.* State Board of Health, 108 Ky., 769. *Mississippi*—Hayden *v.* State, 81 Miss., 291. *New York*—Smith *v.* Lane, 24 Hun., 632. *Pennsylvania*—Com. *v.* Thompson, 24 Pa. Co. Ct., 667.

[4] State *v.* Liffring, 61 Ohio St., 39; 55 N. E., 168.

other agency for the treatment, cure, or relief of any wound, fracture or bodily injury, infirmity or disease.[1] In New Jersey it has been held that osteopathy is not within the purview of a statute making unlawful the applying of any drug, medicine, or other agency or application by an unlicensed physician.[2] On the other hand, it has been held in Illinois and in Nebraska that an osteopath is amenable to statutes which provide that anyone shall be regarded as practising medicine who shall treat, operate on, or prescribe for, any physical ailment of another.[3] And that he does not come within a clause providing that such statutes shall not apply to any person who ministers to or treats the sick or suffering by mental or spiritual means, without the use of any drug or material remedy.[4] It has been held in a late Ohio case that the system of rubbing and kneading the body, commonly known as osteopathy, is comprehended within the statutory definition of the practice of medicine.[5] In Alabama and in the later New York decisions it has been held that the legislative intent was to include all who practise the healing art and not to confine it to those who merely administer drugs or use surgical instruments.[6]

(*c*) **Christian Science.**—As in the case of osteopathy whether or not a person giving Christian Science treatment is to be regarded as practising medicine

[1] Eastman *v.* State, 4 Ohio N. P., 163.

[2] State *v.* Herring, 70 N. J. L., 34; 56 Atl., 670.

[3] *Illinois*—People *v.* Gordon, 194 Ill., 560, reversing 96 Ill. App., 456; People *v.* Jones, 92 Ill. App., 445; Eastman *v.* State, 71 Ill. App., 236. *Nebraska*—Little *v.* State, 60 Nebr., 749.

[4] State Board of Health *v.* Jones, 92 Ill. App., 447.

[5] State *v.* Gravett, 65 Ohio St., 289.

[6] *Alabama*—Bragg *v.* State, 134 Ala., 165; 32 So., 767; Ligon *v.* State, 145 Ala., 659; 39 So., 662. *New York*—People *v.* Allcutt, 117 App. Div., 546, affirmed 189 N. Y., 517; 81 N. E., 1171; matter of Bandel *v.* Dept of Health, 193 N. Y., 133.

depends upon the breadth of the definition of the term "practising medicine" as set out in the statute, or upon the construction placed upon the term by the courts. It has been held in Ohio that the giving of Christian Science treatment for a fee for the cure of disease is practising medicine within the meaning of statutes providing that any person who shall for a fee prescribe or recommend for the use of any person any drug, medicine, or other agency for the treatment, cure, or relief of any bodily injury, infirmity, or disease, shall be regarded as practising medicine and surgery.[1] In Nebraska it has been held that the act to regulate the practice of medicine is as much directed against any unauthorized person who shall operate on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another as against one who practises medicine.[2] On the other hand, it has been held in Rhode Island that praying for those suffering from disease or teaching that disease will disappear and that physical perfection be attained as a result of prayer, does not constitute the practice of medicine.[3] In Missouri it has been held that a Christian Scientist who believes that disease is an illusion of the mind and not a reality, and teaches the sick this theory of disease is not a physician within the meaning of the Missouri statute.[4]

(*d*) **Bone Setting.**—One who professes and practises bone setting in dislocations and fractures, reducing sprains, swellings, and contractions of the sinews by friction and fomentation has been held to be engaged in the practice of surgery.[5]

[1] State *v.* Marble, 72 Ohio St., 21; 73 N. E., 1063.
[2] State *v.* Buswell, 40 Nebr., 158.
[3] State *v.* Mylod, 20 R. I., 632.
[4] Kansas City *v.* Baird, 92 Mo. App., 204.
[5] Hewitt *v.* Charier, 16 Pick. (Mass.), 353.

(*e*) **Midwifery and Obstetrics.**—One who practises midwifery or obstetrics is within the statute requiring a license and other qualifications of persons practising medicine or surgery.[1]

(*f*) **Ophthalmology.**—One who has an office in a hotel and has on his door the sign "Dr. ——," and who when called upon by a patient and engaged to treat her eyes told her she had a cataract, astigmatism, and other ailments of the eyes, which he treated by prescribing ointment or salves and eye washes, for which he charged her ten dollars, and furnished her with glasses for which he charged fifteen dollars is engaged in the practice of medicine within the meaning of the Missouri statute.[2]

Publishing a card as "doctor of neurology and ophthalmology" is a public profession that one is a physician, and this with the assumption of duties as such, comes within the meaning of the statute prohibiting the practice of medicine without a license.[3]

(*g*) **Treatment of Disease by Science of Light.**—One who treats disease by the operation of the science of light is not within a proviso exempting opticians from the operation of a statute requiring physicians and surgeons to be licensed; when he makes microscopic examinations of the blood taken from his patients in his diagnoses of their disease, and treats them by placing them under the rays of electric arc lights of a certain kind, and also writes prescriptions and prescribes remedies, though no charge is made for prescriptions.[4]

[1] People *v.* Arendt, 60 Ill. App., 89; Com. *v.* Porn, 196 Mass., 326; State *v.* Welch, 129 N. C., 579.

[2] State *v.* Blumenthal, 141 Mo. App., 500.

[3] State *v.* Wilhite, 132 Iowa, 226.

[4] O'Neil *v.* State, 115 Tenn., 427.

(*h*) **Healers.**—One holding himself out as a doctor and advertising to the public that he is able to cure disease by suggestion and laying on of hands is, although he does not use drugs or surgery, within the meaning of a statute forbidding the practice of medicine without a license, and defining the practice of medicine as announcing to the public a readiness to attempt to heal, cure, or relieve disease of mind or body, or to use in connection with one's name the word "doctor" or "healer" intended to designate him as a practitioner of medicine of any of its branches.[1]

(*i*) **Magnetic Healers.**—One who advertises himself as a magnetic healer, and who gives treatment by rubbing or kneading the body for the purpose of freeing the nerve force or in the nature of osteopathic treatment, is not within the exception in favor of those treating the sick by mental or spiritual means, even though he accompanies his treatment by mental suggestion, but is practising medicine within the meaning of the statute requiring a license therefor.[2]

A sign "Dr. ——, Magnetic Healer," is evidence that one held himself out as a medical practitioner.[3]

(*j*) **Magic Healing.**—One who professes to "heal the sick without the use of medicine" but "by placing his hands upon that portion of the body that is affected by pain," the healing resulting from "magic power given direct from the Lord," is not a medical practitioner within the meaning of the Georgia statutes.[4]

(*k*) **Clairvoyance.**—A medical clairvoyant who visits sick patients, examines their condition, determines the nature of the disease, and prescribes the remedies deemed most appropriate is engaged in the practice

[1] Witty *v.* Indiana, 90 N. E., 627.
[2] People *v.* Trenner, 144 Ill. App., 275; State *v.* Heath, 125 Ia., 585.
[3] People *v.* Phippin, 70 Mich., 6.
[4] Bennett *v.* Ware, 4 Ga. App., 293.

of medicine.[1] But it has been held in Massachusetts that a "*mere*" clairvoyant was not a physician.[2]

(*l*) **The Giving of Electric Treatments.**—This is the practice of medicine within the meaning of statutes requiring persons engaged in the practice of medicine and surgery to file certain papers.[3]

(*m*) **Chiropractice.**—One advertising himself as a chiropractic and undertaking to heal persons according to that system by manipulating the spine of the patient is engaged in the practice of medicine.[4] One who advertises as "Dr. M——, Chiropractor, Read carefully the contents of this Booklet. It will interest you. The Cure of Disease. Cure of disease follows Chiropractice adjustment because Chiropractice removes the cause. Chiropractice is a Distinct and Complete, Drugless, and Knifeless System and has nothing in common with Osteopathy, Massage, Swedish Movement or any other system. Chiropractice is successful in all forms of disease. This means your Disease. If your case is numbered among those supposed impossibilities, do not despair. Try Chiropractice and get well. . . . Chiropractice is a common-sense treatment. It will bear investigation. It is based on a correct knowledge of the nervous tissues. It adjusts all displacements and allows the innate builder to reconstruct the broken-down tissues," has been held to be within the statute prohibiting the practice of medicine without a license.[5]

(*n*) **Doctor of Mechano-neural Therapy.**—One who advertises himself as a doctor practising mechano-neural therapy, who makes a diagnosis and prescribes

[1] Bibber *v.* Simpson, 59 Maine, 181; Wilson *v.* Harrington, 72 Wis., 591.
[2] Wood *v.* O'Kelly, 62 Mass., 406.
[3] Davidson *v.* Bohlman, 37 Mo. App., 576.
[4] State *v.* Corwin (Iowa Supreme Court, 1911).
[5] State *v.* Miller, 146 Iowa, 521.

diet and conduct and simple remedies, and who asserts the power to cure all diseases that any physician can cure without drugs and also diseases that they cannot cure with drugs, and who takes payment for a consultation wherein there is an examination and determination of the trouble, as well as payment for subsequent treatment, even if no drugs are administered, is engaged in the practice of medicine within the meaning of the registration statute.[1]

(*o*) **Doctor of Dermatology and Physical Education.**—One who has on his office door his name with the prefix "Dr." and followed by the words "Doctor of Dermatology and Physical Education," advertising himself as having opened an office for the practice of dermatology and physical education in the cure of every and all manner of disease on the inside or outside of the human body, stating that consultation and advice are absolutely free, the only charge being for Electro-Magnetic Nerve Food and work done, and who, after diagnosticating a case brought to him, sells different sorts of his nerve food with directions as to its use or applies it himself, is engaged in the practice of medicine in violation of the statute.[2]

(*p*) **Hypnotism or Massage.**—Personal treatment of one person by another by hypnotism or massage alone, unaccompanied by any direction as to the use of drugs, medicines, or other remedies to be used by the patient, does not come within the term "prescribing remedies" as used in a statute requiring every person whose business it is, for a fee or a reward, to prescribe remedies or perform surgical operation for the cure of any bodily disease or ailment to obtain a license, but when accompanied by such direction as

[1] People *v.* Allcutt, 117 App. Div., 546, affirmed in 189 N. Y., 517.
[2] State *v.* Hefferman, 28 R. I., 20; 65 Atl., 284.

to the use of drugs, medicines, or other remedies by the patient, it will come within the terms of such statute and be in violation thereof.[1]

(*q*) **Professing to Cure Opium Habit.**—One who styles himself a doctor, and who claims to cure the opium habit, is within the provision of a statute making illegal the practice of medicine without a license.[2]

(*r*) **Vending and Administering Patent Medicines.**—The mere sale of patent medicines by one who does not diagnosticate disease and determine what remedy is proper is not the practice of medicine. But a patent issued to a person, granting him the sole right to manufacture a certain remedy, does not authorize him to administer it as a physician, unless he has complied with the statutory requirements.[3] An unlicensed person claiming to be a physician and holding himself out to the world as such, cannot, after examining a patient, who has asked his services, diagnosticating the disease, fixing an amount or price for which he will cure the patient and giving him a prescription, evade the law by proving that the medicine was a proprietary remedy prepared and sold by him. As was said by the Court in a North Carolina Supreme Court decision, "If such were the law, a pretender, with half a dozen or more medicines of his own manufacture, and marked as nostrums suitable for certain classes of diseases, might declare himself a graduate in medicine and capable of curing diseases of all kinds, after examining the patient and determining which one of his ready-made preparations would prove the panacea to meet the particular symptoms, might administer it and thus defeat and evade this salutary

[1] State *v.* Lawson (Del.), 65 Atl., 593.
[2] Benham *v.* State, 116 Ind., 112; 18 N. E., 454.
[3] Jordan *v.* Dayton, 4 Ohio, 295.

law passed for the purpose of preventing quacks from masquerading as trained medical men."[1] Thus it has been held that one who professes knowledge of the science of medicine, and who obtains patients, diagnosticating their cases, deciding that they were suffering from a malady for which he had compounded a remedy, prescribing and furnishing that remedy, and employing other physicians to take immediate charge of the patients and administer the remedy, is engaged in the practice of medicine.[2] The Supreme Court of Tennessee has held one engaged in the practice of medicine, where it appeared that he was advertising a patent medicine by making a speech or harangue to a crowd assembled in the open air, and that he said if anybody with a stiff neck or joint, headache or rheumatism, or neuralgia, or a stiff hand, would come on the stage he would guarantee to cure him in five minutes with his liniment, and that people accordingly went up to the stage, and that such person rubbed liniment on those that responded to his invitation, for the purpose of relieving the stiff neck or stiff hand, as the case might be, and stated that the directions were on the bottle and that the purchaser could increase or diminish the dose as the case might require, and also instructed him that it would benefit him to take a cold bath every morning and that his diet should be eggs, buttermilk, and corn bread.[3] One who styles himself Blue Mountain Joe, and travels through the country with a band of music and some Indians, giving free entertainments, at which he told what diseases he could cure, and sold his remedies is engaged in the practice of medicine within the State.[4]

[1] State *v.* Van Doran, 109 N. C., 864; 14 S. E., 32.
[2] Springer *v.* District of Columbia, 23 App. Cas., 59.
[3] Payne *v.* State, 112 Tenn., 588; 79 S. W., 1025.
[4] People *v.* Blue Mountain Joe, 129 Ill., 370; 21 N. E., 923.

(*s*) **Administering Domestic Remedy for Pay.**—It is well settled that one who holds himself out as competent to prescribe is engaged in the practice of medicine, although the remedy prescribed and charged for is of his own invention.[1] But one who does not solicit patronage and who does not hold himself out as, or pretend to be a physician, but simply advises or gives medicine to a sick person merely as a neighbor and friend, and makes no charge and expects no compensation, is not engaged in the practice of medicine.[2]

Quinine is not a domestic remedy.[3]

(*t*) **Practising under Licensed Physician.**—Any person practising medicine without the statutory qualifications is liable to the penalties provided for by statute, although the operations are performed and the medicines administered and given under the direction and charge of a licensed physician and surgeon.[4]

4. RIGHT OF WOMEN TO PRACTISE MEDICINE

As late as 1638 we find this: "Jane Hawkins, the wife of Richard Hawkins had liberty till the beginning of the third month called May, and the magistrate to dispose of her; and in the meantime she is not to meddle in surgery or phisick, drinks, plaisters or oyles, nor to question matters of religion without except with the elders for satisfaction."[5] In the United States at the present time, women have free access to Medical Colleges.

[1] People *v.* Lee Wah, 71 Cal., 80; 11 Pac., 851; State *v.* Van Doran, 109 N. C., 864; Jordan *v.* Dayton, 4 Ohio, 295; State *v.* Heffernan, 28 R. I., 20; 65 Atl., 284; Payne *v.* State, 112 Tenn., 587.

[2] Nelson *v.* State, 97 Ala., 79; 12 So., 421.

[3] Cook *v.* People, 125 Ill., 278; 17 N. E., 849.

[4] State *v.* Reed, 68 Ark., 331; 58 S. W., 40; State *v.* Paul, 56 Nebr., 369; 76 N. W., 861.

[5] True Blue Laws of Connecticut, by J. H. Trumbull, 1876.

5. RIGHT OF CORPORATIONS TO PRACTISE MEDICINE

A corporation cannot be licensed to practise medicine, but qualified and licensed physicians may form a corporation and make contracts for the services of its members and other licensed physicians. The qualifications of a medical practitioner is personal to himself.[1]

[1] State Eclectro-Medical Institute *v.* State, 74 Nebr., 103.

CHAPTER IV

RELATION OF PHYSICIAN TO PATIENT

1. **In General.**—The relation existing between the physician or surgeon and the patient is of a peculiar nature. The law creates an implied contract between them based upon the relation. This contract is really founded upon the duty which the law imposes upon the physician in the interest of the public, which requires that he shall use ordinary skill and knowledge in any case. There is no implied contract that the physician will effect a cure. Such a contract can only be expressly made.[1]

2. **Duty to Respond to All Calls.**—It seems to be conceded that a physician is not liable at common law for refusing to attend a sick person who demands his services. And in at least one State it has been held that he is under no obligation to respond to a call by reason of the fact that he holds a State's license to practise medicine, although he is the family physician and no other physician is procurable.[2] It is not until a physician accepts a person as a patient that his duties and the corresponding obligations arise.

Upon consenting to treat a patient it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed.

3. **Duty of Physician to Patient.**—A physician or surgeon holding himself out to practise medicine and

[1] Pike *v.* Honsinger, 155 N. Y., 201.
[2] Hurley *v.* Eddingfield, 156 Ind., 416.

undertaking employment, impliedly contracts with his patient that he possesses a reasonable degree of learning, skill, and experience, and that he will use reasonable and ordinary care and diligence in the performance of his professional duty.[1]

The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and to render a physician liable, it is not enough that there has been a less degree of care than some other medical man might have bestowed, but there must be a want of ordinary and reasonable care leading to a bad result. This includes not only the diagnosis[2] and treatment,[3] but also the giving of proper instructions to his patient or his attendants.[4]

He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment. In accepting a patient, the physician in effect says that he possesses and will exercise reasonable skill and judgment to discover the trouble of the patient and whether it is curable.[5]

The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill which belongs only to a few men

[1] State *v.* Housekeeper, 70 Md., 162; Pike *v.* Honsinger, 155 N. Y., 201.

[2] *Colorado*—Jackson *v.* Burnham, 20 Colo., 532; 39 Pac., 577. *Illinois*—Quinn *v.* Donovan, 85 Ill., 194. *Maine*—Patten *v.* Wiggin, 51 Me., 594. *Missouri*—Grainger *v.* Still, 187 Mo., 197; 85 S. W., 1114. *New York*—Graves *v.* Santway, 52 Hun., 613; 127 N. Y., 677.

[3] Quinn *v.* Donovan, 85 Ill., 194; Pike *v.* Honsinger, 155 N. Y., 201.

[4] Beck *v.* Klinik, 78 Iowa, 696; Feeney *v.* Spalding, 89 Me., 111; Vanhooser *v.* Berghoff, 90 Mo., 487; Carpenter *v.* Blake, 75 N. Y., 12; Pike *v.* Honsinger, 155 N. Y., 203.

[5] Logan *v.* Field, 192 Mo., 54.

of rare endowments, but such as is possessed by the average member of the medical profession in good standing.[1] Still he is bound to keep abreast of the times, and a departure from the approved methods in general use if it injures the patient will render him liable, however good his intentions may have been.[2]

Discoveries in the natural science for the last half century have exerted a sensible influence on all the learned professions, but especially on that of medicine, whose circle of truths has been relatively enlarged, and besides, there has been a positive progress in that profession resulting from the studies, the experiments, and the diversified practice of its professors. The patient is entitled to the benefit of these increased lights. The physician or surgeon who assumes to exercise the healing art is bound to be up to the improvements of the day. The standard of ordinary skill is on the advance; and he who would not be found wanting, must apply himself with all diligence to the most accredited sources of knowledge. An amputation which would have been justified twenty-five years ago would now be looked upon as clear evidence of ignorance and unskilfulness.

The general rule of law is that a physician or surgeon, or one who holds himself out as such, whether duly licensed or not, when he accepts an employment to treat a patient professionally, must exercise such reasonable care and skill in that behalf as is usually possessed and exercised by physicians or surgeons

[1] Landon *v.* Humphry, 9 Conn., 209; Tefft *v.* Wilcox, 6 Kan., 46; Howard *v.* Grover, 28 Me., 97; Simonds *v.* Henry, 39 Me., 155; Pike *v.* Honsinger, 155 N. Y., 201.

[2] *Iowa*—Dunbauld *v.* Thompson, 109 Ia., 199. *Kansas*—Tefft *v.* Wilcox, 6 Kan., 46. *Maine*—Patten *v.* Wiggin, 51 Me., 594. *New York*—Carpenter *v.* Blake, 60 Barb., 488. *Ohio*—Gillette *v.* Tucker, 67 Ohio St., 106. *Pennsylvania*—22 Pa. St., 261. *Rhode Island*—Bigney *v.* Fisher, 26 R. I., 402.

in good standing of the same system or school of practice. For all the physician undertakes is that he will faithfully treat the case according to the recognized rules of his particular school.[1] The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment, provided he does what he thinks best after careful examination.[2] His implied engagement with his patient does not guarantee a good result.

4. **Contract of Employment.**—(*a*) *Express Contracts.*—A physician or surgeon may enter into an express contract with a patient; in fact, the majority of surgical operations are performed under an express contract; and it is becoming more common for physicians to be paid by the month or year for their services to a family, and in a great many chronic cases they are retained to effect a cure for a certain sum. The contract need not be in writing, and the physician will be held to the sum stipulated in the contract no matter how much work or unexpected services he will be required to perform.

(*b*) *Implied Contracts.*—Every layman is familiar with the fact that the great majority of contracts between physicians and patients are implied contracts, that is, the contract is evidenced by conduct manifesting an intention of agreement. For example: The patient sends for the physician or calls at his office, the physician drives out to his home or makes an examination at the office, diagnosticates the case, gives the patient some medicine, and proceeds to treat the case without informing the patient of the length of time necessary to effect a cure, the drugs he intends

[1] Patten *v.* Wiggin, 51 Me., 594.

[2] Fisher *v.* Nicolls, 2 Ill. App., 484; Pike *v.* Honsinger, 155 N. Y., 201; Heath *v.* Glisan, 3 Or., 64.

to use, how skilfully he will perform the work, what he will charge for it, or when he expects his pay. In such cases the law implies a contract between them. In the first place it implies the physician will perform his services with the skill and learning of the average physician and that the patient will pay for the services, when properly performed, if the fee is the ordinary and reasonable charge for such services. In the absence of a special contract to that effect, a physician does not warrant or insure that his treatment will be successful or even beneficial.[1]

The implied contract of a physician or surgeon is not to cure—to restore a fractured limb to its natural perfectness—but to treat the case with diligence and skill. The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and length; or the patient may, by wilful disregard of the surgeon's directions, impair the effect of the best conceived measures.[2]

As was said by Judge Woodward in a Supreme Court decision in Pennsylvania: "He deals not with insensate matter like the stonemason or bricklayer, who can choose their materials and adjust them along mathematical lines; but he has a suffering human being to treat, a nervous system to tranquilize, and a will to regulate and control."[3]

Freedom from errors of judgment is never contracted

[1] *United States*—Ewing *v.* Goode, 78 Fed. Rep., 442. *Colorado*—Jackson *v.* Burnham, 20 Colo., 532. *Illinois*—Quinn *v.* Donovan, 85 Ill., 194; Yunker *v.* Marshall, 65 Ill. App., 667. *Indiana*—Jones *v.* Angell, 95 Ind., 376; Hoopingarner *v.* Levy, 77 Ind., 455. *Kansas*—Teft *v.* Wilcox, 6 Kan., 46; Pettigrew *v.* Lewis, 46 Kan., 78. *Kentucky*—Hickerson *v.* Neely (Ky. 1900), 54 S. W., 842.

[2] Fish *v.* Welker, 5 Ohio Dec., 752; Williams *v.* Poppleton, 3 Or., 139; McCandless *v.* McWha, 22 Pa., 261; Bigney *v.* Fisher, 26 R. I., 402; 59 Atl., 72.

[3] McCandless *v.* McWha, 22 Pa. St., 261.

for by the physician. Ordinary good judgment is necessarily implied in the possession of ordinary skill, and if such share of judgment is fairly exercised, any risk from mere errors and mistakes is upon the employer alone. The patient, too, has judgment to exercise in the selection of the physician whom he will employ; and if he makes a bad selection—if he fails to choose a man of the best judgment—the result is fairly to be attributed to his own mistake, and is not to be visited upon the man who has honestly done his best endeavor in his service. It is in accordance with these views that it has often been held that a physician is not responsible for errors of judgment, for mere mistakes, in cases of reasonable doubt and uncertainty.[1]

5. **Duty as to Frequency of Visits.**—A physician must, in the first instance, determine how often he ought to visit a patient, and if the party employing him accepts his services and does not discharge him or require him to come less frequently, or fix the times when he wishes him to attend, he cannot afterward refuse to pay for visits on the ground that they were unnecessary, for the physician is the judge as to the frequency of the visits in the absence of an agreement to the contrary.[2]

6. **Duration of Employment.**—The employment of a physician continues while sickness lasts, unless put an end to by the assent of the parties or revoked by the express dismissal of the physician,[3] the character

[1] Jackson *v.* Burnham, 20 Colo., 532; Vanhooser *v.* Berghoff, 90 Mo., 487; 3 S. W., 72; Carpenter *v.* Blake, 60 Barb., 488; Leighton *v.* Sargeant, 7 Foster (N. H.), 460; Heath *v.* Glisan, 3 Or., 64; Graham *v.* Gautier, 21 Tex., 111; Dye *v.* Corbin, 59 W. Va., 266, 53 S. E., 147.

[2] Ebner *v.* Mackey, 186 Ill., 297, 57 N. E., 834.

[3] Tomer *v.* Aiken, 126 Iowa, 114; Lawson *v.* Conaway, 37 W. Va., 159; 16 S. E., 564.

of a physician's services being such that he cannot quit the services without cause or reasonable notice;[1] but where the employment of a physician has been terminated, he may refuse further attendance, and such refusal, where there is no further showing, save that the patient was suffering the pain usual in such cases, will not justify the admission of evidence that the same amounted to improper treatment.[2]

A physician who leaves a patient at a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty.[3]

7. **Duty as to Diagnosis.**—A physician or surgeon employed to treat an injury or disease impliedly contracts that he will use his best judgment in the application of his skill in deciding upon the nature of the disease or injury and the best mode of treatment.[4]

If through negligence or the want of ordinary skill, care, or diligence the practitioner fails to make such a sufficient examination as would enable him to diagnosticate a case correctly, he will be held guilty of malpractice, and liable for damages resulting therefrom, for the patient is entitled to an ordinarily careful and thorough examination of his injuries, such as the circumstances attending their infliction, the condition of the patient, and the surgeon's opportunities for proper examination suggested and allowed."[5] It has been said that erroneous diagnosis alone, not followed by improper treatment, does not render the physician liable for malpractice.

The court in a case where the plaintiff was engaged

[1] Gillette *v.* Tucker, 67 O. S., 106.
[2] Tomer *v.* Aiken, 126 Iowa, 114.
[3] Barbour *v.* Martin, 62 Me., 536.
[4] Bonnett *v.* Foot, 47 Colo., 282.
[5] Burk *v.* Foster, 114 Ky., 20.

to marry the daughter of a party and in which the evidence showed that the party was informed that the plaintiff was diseased and thereupon employed the defendant, a physician, to examine the plaintiff, with the result that the plaintiff was reported diseased and the engagement broken, said: "Having undertaken for compensation to be paid by another to examine plaintiff, and to report whether he was diseased, the defendant was bound to have the ordinary skill and learning of a physician and surgeon, and exercise ordinary diligence and care, and if he failed, and the plaintiff was injured because of his want of such skill and learning, or his want of such care, the defendant was answerable to him in damages."

Thus it seems to be settled that a physician is liable for a negligent diagnosis in cases where no treatment is rendered. In Logan *v.* Field,[1] a Missouri case, it was held that the plaintiff was entitled to damages where a reasonable careful diagnosis would have shown that the disease was incurable, or would not yield to usual treatment or that it was probable that the patient would not be benefited by such treatment, and the physician failed to make such discovery or failed to advise the patient thereof.

A physician is not required to be infallible in diagnosticating diseases, so that the fact that a patient's disease was different than it was diagnosticated to be is merely evidence of negligence.[2]

8. **Duty as to Appliances.**—Physicians and surgeons are under implied obligations when they undertake to treat diseases or injuries to bring to their aid such obtainable appliances as discovery and experience have

[1] 75 Mo. App., 594.
[2] Hamrick *v.* Shipp (Ala.), 52 So., 932.

found to be the most proper and beneficial in aiding recovery.[1]

9. **Duty as to the Use of Anesthetics.**—A physician or surgeon using an anesthetic agent is bound to look to the natural and probable effects thereof; but he is not answerable for negligence on results arising from the peculiar condition or temperament of the patient of which he had no knowledge. It is his duty, however, to use the highest professional care and skill to avoid every possible danger.[2]

10. **Duty to Give Instructions.**—It is the duty of the physician or surgeon to inform the patient or those having charge of him as to all reasonable instructions as to the treatment and care of the particular case, not only for the period during which the physician is attending the patient, but also for the period of convalescence. The physician, however, is not bound to anticipate and advise against improbable conduct on the part of the patient.[3]

The failure to give any instruction when such instruction should be given, or the giving of erroneous instructions will render a physician liable for malpractice if injury result. In an Iowa case the court said: "The jury found especially that defendants properly set plaintiff's leg; that they properly treated it until he was discharged; and that they used proper and approved methods and appliances in the treatment of the leg—but it nowhere found, directly or by implication, that they gave plaintiff proper instructions, or did not give him improper instructions, for the care and use of his injured leg. Defendants may

[1] Stevenson *v.* Gelsthorpe, 10 Mont., 563. See Chapter VI.

[2] Bogle *v.* Winslow, 5 Phila., 136; Keily *v.* Colton, 1 N. Y. City Ct., 439. See also Chapter VI.

[3] Carpenter *v.* Blake, 60 Barb. (N. Y.), 488; Beck *v.* German Klinik, 78 Ia., 696; Richards *v.* Willard, 176 Pa., 181; 35 Atl., 114.

have exercised proper care, and used proper skill in all things, yet, under the law of the case, if they omitted to give plaintiff proper instructions for the care and use of his wounded leg, they were rightly held liable by the jury. As we have said, the jury was authorized to find for the plaintiff under the evidence, on the ground of defendant's negligence in the omission to discharge their duty to instruct plaintiff as to the care and use of his injured leg."[1]

11. **Duty to Avoid Communicating Contagious Diseases.**—It is the duty of physicians who are attending patients inflicted with infectious or contagious diseases, when called to attend other patients not so infected, to take all such precautionary means as experience has proved to be necessary to prevent its communication to their patients. This rule applies to the communication of a disease from which the physician himself is suffering as well as to the communication by the physician of a disease from one patient to another, as where, having treated one patient known to him to have an infectious or contagious disease, he proceeds to treat another patient without warning him, and without taking precautionary measures against the communication of the disease.[2]

The law requires the use of all possible care to prevent the spread of smallpox or other contagious diseases; and while the medical profession is divided as to the necessity of using any particular precautionary measures, a physician or other person having the care of smallpox patients will be justified in adopting it; and within the operation of this rule paper may be removed from the walls of rooms in which smallpox patients have been sick, if in the opinion

[1] Beck *v.* The German Klinik, 78 Ia., 696.
[2] Piper *v.* Menifee, 12 B. Mon. (Ky.), 465.

of the attending physician it has become so soiled and besmeared with smallpox virus as to make its removal necessary.[1]

12. **As to Communications by Patient to Physician.**—So sacred is the knowledge which comes to a physician or surgeon in a professional way that nearly all of the States have enacted statutes forbidding the disclosure in evidence against the will of the patient, of information acquired by physicians in a professional capacity. These statutes have been enacted on the grounds of public policy, and the cases arising thereunder form an important branch of our law, and are treated in Chapter IX of this work.

13. **Validity of Gifts and Conveyances from Patient to Physician.**—The relation between a medical man and his patient is one in which the probability of undue influence is inferred; and so in dealings with their patients the acts of physicians are watched with great jealousy.[2]

Thus the law will presume a contract between a physician and a patient, who is old and failing in mind, to have been the result of undue influence emanating from the stronger party. But in the case of a sale by a patient to a physician, where there was no proof of inadequacy of price, the transaction was sustained.[3]

While the relation of physician and patient exist, the advisor shall take no benefit to himself from contracts or other negotiations, without establishing this perfect fairness and adequacy, and that the deed was the deliberate act of the confiding party, after being fully informed of his rights, interest, and duties,

[1] Seavey *v.* Preble, 64 Me., 120.
[2] Cadwallader *v.* West, 48 Mo., 483.
[3] Doggett *v.* Lane, 12 Mo., 215.

and put on his guard against even the suggestion of his own inclination.[1]

The position occupied by a physician toward his patient is of such a confidential character as to throw upon him the duty of showing, expressly, that a conveyance of real estate from the patient was fair and conscientious, beyond the reach of suspicion.[2] A contract between physician and patient whereby the former agrees, for a fixed sum to be paid after the other's death, to render professional services and furnish medicine to the patient for the remainder of her natural lifetime in any sickness or indisposition she may suffer at any time or place, is not void as against public policy or as a wagering contract.[3]

14. **Duty of Patient Toward His Physician.**—It is the duty of the patient to coöperate with the physician, and to conform to his prescriptions and directions, and if he neglect to do so he cannot hold the physician responsible for his own neglect. To entitle a patient to recover he must not have contributed to his injury in any degree.[4] Neither can the patient recover when, by his own acts, he has rendered it impossible to determine whether the suffering and pain complained of was caused by his own negligence. For example, where by his own voluntary act he leaves the hospital before he ought to do so and makes it impossible to tell whether or not he would have been cured had he remained. Or, "for instance, suppose a man fractures the bones in his leg below the knee, and calls a surgeon to treat the injuries, and the surgeon negligently fails to reduce one of the fractures,

[1] Greenfield's Estate, 14 Pa., 506.

[2] Unruh *v.* Lukens, 166 Pa., 324.

[3] Zeigler *v.* Illinois F. & S. Bank, 245 Ill., 180.

[4] Geiselman *v.* Scott, 25 Ohio St., 86; McCandless *v.* McWha, 22 Pa., 261; Lawson *v.* Conaway, 37 W. Va., 159.

but in all other respects gives proper treatment, and the patient, in disobedience to the directions of the surgeon, negligently removes the bandages used as a part of the proper treatment by the surgeon, or is otherwise guilty of contributory negligence, and such combined negligence of the surgeon and patient unite in producing a shortness and stiffness of the leg for which injuries an action is brought against the surgeon—can the patient recover? The patient is certainly not responsible in such a case for the original negligence of the surgeon in failing to properly reduce the fracture, but this negligence of the surgeon unites with the subsequent contributory negligence of the patient in causing the shortness and stiffness of the leg." Hence, the patient has no cause of action against the surgeon.[1]

As was said in a Pennsylvania case by Judge Lewis: "A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction; but, if it be painful, injurious, and unskilful, he is not bound to peril his health, and perhaps his life, by submission to it. It follows that before the surgeon can shift the responsibility from himself to the patient on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper, and adapted to the end in view."[2] The most common form of contributory negligence on the part of the patient is where the patient disobeys the instructions of his physician; it being the duty of a patient to coöperate with his physician and obey all necessary instructions. So, if a surgeon tells his patient to visit him again as soon

[1] Young *v.* Mason, 8 Ind. App., 264; 35 N. E., 521.
[2] McCandless *v.* McWha, 22 Pa., 261, 272.

as he feels any pain, and, though he felt pain for a week, he did not return according to his instructions, the surgeon is exonerated for the resulting injury.[1] So, if a physician requests the employment of another physician for consultation and to assist in administration of an anesthetic, and the patient refuses or neglects to secure it, the physician will not be liable for the permanent injury resulting, when such assistance would have rendered the injury only temporary.[2] Likewise, if a patient who is directed by his physician to observe absolute rest as a part of the treatment of an injured foot, negligently fails to observe such direction, or purposely disobeys the same, he cannot recover if such disobedience proximately contributes to the injury of which he complains.[3]

15. **Sunday Contracts.**—In statutes prohibiting work or labor on Sunday there is usually an exception made in favor of works of charity or necessity. Indeed, statutes without this exception have been held void. As to what constitutes a work of charity or necessity there have been numerous decisions, and it is impossible to lay down any general rule as to works of charity and necessity; but it has been uniformly held that the employment of a physician and a promise to pay him is not unlawful because made on Sunday.

[1] Jones *v.* Angell, 95 Ind., 376.
[2] Haering *v.* Spicer, 92 Ill. App., 449.
[3] Geiselman *v.* Scott, 25 Ohio St., 86.

CHAPTER V

COMPENSATION

1. RIGHT TO RECOVER COMPENSATION

(*a*) **In General.**—In England a physician cannot recover fees by any legal process, as by an ancient fiction he is supposed to render his services for purely philanthropic motives; though a mere surgeon has a legal right to his fees. And it has been held that a physician might recover for professional services on a special contract.[1] No such distinction exists or appears ever to have existed in this country. Physicians of all grades can sue for their fees. And the law implies a promise of the patient to pay for medical services rendered, whether such services were beneficial to the patient or not.[2] But an implied promise to pay for professional services is not presumed from the mere fact of their rendition.[3] A physician who is a member of a board of health may recover reasonable compensation for purely professional services which any other physician might render, where rendered by him under direction of the board of health without any expressed agreement for compensation.[4]

(*b*) **License as Prerequisite to Compensations.**—A contract to pay a fee for services rendered by a physician who is not licensed to practise medicine is void in its inception where a statute prohibits him

[1] Attorney General *v.* Royal College of Physicians, 7 Jus. N. S., 511.
[2] Logan *v.* Field, 192 Mo., 54.
[3] Bremerman *v.* Hayes, 9 Pa. Super. Ct., 8.
[4] Spearman *v.* City of Texarkana, Ark.

from practising as a physician for a fee or a reward.[1] Thus a physician and surgeon practising without a license cannot recover for professional services rendered where the statute makes it a misdemeanor to practise medicine without first procuring an official license to do so.[2] In the majority of the States no express provision upon the subject exists, and in such States the right of the unqualified physician to recover his compensation has been denied by the courts.[3] But a physician practising without a license may maintain an action at law for his services if during the time of those services there was no existing board of examiners.[4] A contract by a physician to treat his patient professionally for any sickness she might suffer is not rendered invalid by the fact that he had no license to practise medicine in the State where the patient was temporarily sojourning at the time of her death, when he was duly licensed to practise medicine in the State where the contract was made and was merely attending such patient and not in general practice in the other State.[5]

(*c*) **Registry as Prerequisite to Compensation.**—A physician or surgeon can recover no compensation for services rendered when they have failed to register as required by statute,[6] unless such registration is

[1] *Louisiana*—Czarnowski *v.* Zeyer, 35 La. Ann., 796; Quarles *v.* Evans, 7 La. Ann., 543. *Maine*—Holmes *v.* Hade, 74 Me., 28. *Nebraska*—Maxwell *v.* Swigart, 48 Nebr., 789. *North Carolina*—Puckett *v.* Alexander, 102 N. C., 95.

[2] Harrison *v.* Jones, 80 Ala., 412.

[3] *Alabama*—Harrison *v.* Jones, 80 Ala., 412. *California*—Gardner *v.* Tatum, 81 Cal., 370. *Georgia*—Murray *v.* Wilbains, 121 Ga., 63. *Indiana*—Orr *v.* Meek, 111 Ind., 40. *Mississippi*—Bohn *v.* Lowery, 77 Miss., 424. *New York*—Accetta *v.* Zupa, 54 App. Div., 33. *Tennessee*—Haworth *v.* Montgomery, 91 Tenn., 16.

[4] Woodside *v.* Baldwin, 30 Fed. Cas. No. 17, 995.

[5] Zeigler *v.* Illinois T. & S. Bank, 245 Ill., 180.

[6] Accetta *v.* Zupa, 54 App. Div., 33; Wickes-Nease *v.* Watts, 30 Tex. Civ. App., 515; 70 S. W., 1001.

not made a prerequisite to the right to practise.[1] A physician who in consequence of the fact that the clerk of the superior court did not have a book in which he could register did not succeed in doing so, but who was called to attend a patient, and did practise, can recover his fees therefor, it appearing that he registered so soon as the book was obtained by the clerk.[2] It has been held in Missouri that the neglect of a physician to register in accordance with an ordinance penalizing the practice of medicine in the city without doing so is immaterial in an action for medical services.[3]

(*d*) **Effect of Revival of License Act.**—A physician who was practising at the date of the act reviving an act to regulate the licensing of physicians is a qualified physician, and may collect his account for medical services.[4]

(*e*) **Right of Christian Scientist to Recover Compensation.**—Where Christian Scientist treatment is prohibited by law, of course a scientist cannot recover for his services, but where such treatment is not so prohibited he is entitled to his fees for such services. There is nothing immoral or unlawful in a contract between a Christian Science healer and one choosing to be treated. Its wisdom or folly is immaterial, and is for the parties and not for the courts.[5]

(*f*) **As Affected by Want of Skill or Care.**—There is a conflict of authority as to whether a physician or surgeon who has been negligent in diagnosticating a case or in the treatment of it, or who lacks the

[1] Riley *v.* Collins, 16 Colo. App., 280; 64 Pac., 1052.
[2] Parish *v.* Foss, 75 Ga., 439.
[3] Prietto *v.* Lewis, 11 Mo. App., 600.
[4] Maddox *v.* Boswell, 30 Ga., 38; Newsom *v.* Lindsey, 21 Ga., 365.
[5] Wheeler *v.* Sawyer, 15 Atl., 67.

necessary skill and education, can recover in a suit for professional services.

Some cases hold that the same facts which would authorize a recovery for malpractice would constitute a defence in a suit for professional services, holding the contract entire and performance necessary to entitle the physician to recover.[1] In New Jersey it has been held that the right of a physician to be compensated for services depends upon diligent exercise under employment of skill which commonly pertains to the profession.[2] While the courts of other States hold that even though a physician was guilty of negligence in the treatment of a patient, he can recover for the value of his services, less the amount of damage suffered because of his negligence.[3] A late Missouri case lays down the law as regards the right of a physician to recover pay for worthless services rendered thus:

"1. The law implies a promise on the part of the patient to pay for medical services, without regard to whether such services were beneficial to the patient or not.

"2. A physician may pursue a particular course of treatment and charge the patient therefor, as long as the physician has reasonable cause to believe the disease of the patient will yield to the treatment, and this without regard to whether the patient is or is not cured or benefited by such professional service.

"3. The physician has not unlimited discretion to serve his patient.

"4. The patient has a right to expect good faith from the physician; also to rely upon the supposed

[1] *Kansas*—Abbot *v.* Mayfield, 8 Kan. App., 387. *Maine*—Patten *v.* Wiggin, 51 Me., 594. *New York*—Bellinger *v.* Craigue, 31 Barb., 534.

[2] Ely *v.* Wilbur (N. J.), 10 Atl., 358.

[3] *Iowa*—Whitesell *v.* Hill, 101 Iowa, 629. *Wisconsin*—Ressequie *v.* Byers, 52 Wis., 650; 9 N. W., 779.

superior knowledge of the doctor to discover, determine, and advise what course should be pursued in his case.

"5. A physician cannot recover for worthless treatment if he knew or ought to have known, as a reasonably, competent, and prudent man of his profession, of the uncertainty of a cure, and the patient went for and received such treatment because encouraged by the physician to receive the same or because the physician failed to inform him of the uncertainty of the treatment.

"6. In accepting a patient, the physician in effect says that he possesses and will exercise reasonable skill and judgment to discover the trouble of the patient and whether it is curable.

"7. If a physician is conscious of his inability to understand or properly treat the patient's trouble, he should at once inform the patient thereof; concealment by the physician of his ignorance in performing unbeneficial service would be a fraud, and for which service the physician would be entitled to no compensation.

"8. If the failure of a physician to discover and cure the trouble of his patient is because the physician does not possess reasonable skill or because he does not exercise such skill, he is not entitled to any pay for his services.

"9. The law does not permit a physician to recover for worthless professional service even though the physician does not guarantee a cure, if such service is negligent, unskilful, or unfaithful."[1]

(*g*) **Right to Compensation Regardless of Result.**—In the absence of express agreement, a surgeon who brings to services rendered by him to a patient due

[1] Logan *v.* Field, 192 Mo., 54

care and skill, earns the reasonable and customary price thereof, whether the outcome be beneficial to the patient or the reverse.[1]

"A physician is not an insurer of the success of his treatment, and is entitled to pay for his services whether he succeeds in curing his patient or not, provided he uses the skill of an ordinary skilful physician."[2] As was said by the court in a Wisconsin case: "That is not at all the test. So that a surgical operation be conceived and performed with due skill and care, the price to be paid therefor does not depend upon the result."[3] The right to be compensated does not depend upon the measure of success in effecting a cure by the means employed, but upon the diligent exercise under his employment of the skill which commonly pertains to his profession. Such services cannot be regarded as other than beneficial. They are so in a legal sense, and the right to adequate compensation arises upon their rendition, wherever his fees are otherwise recoverable by suit at law.[4] The court in a Tennessee case, which involved an amputation with a butcher knife and a carpenter's saw, said: "It certainly requires some degree of skill in anatomy and surgery to perform an operation of the kind, and the success that attended it, though not conclusive, is a circumstance from which skill may be inferred. The instruments employed, drawn from other vocations, not the most congenial for the special occasion, were certainly unusual and extraordinary for such a purpose. But we are not to infer from this circumstance alone that the surgeon had

[1] Cotnam *v.* Wisdom, 83 Ark., 601.

[2] Yunker *v.* Marshall, 65 Ill. App., 667; Teedman *v.* Loewengrund, 2 W. N. C. Pa., 272.

[3] Ladd *v.* Witte, 116 Wis., 35.

[4] Ely *v.* Wilbur, 49 N. J. L., 685.

not sufficient art and skill in the use of them. Besides, it is possible that the delay necessary to procure proper instruments might have been fatal to the patient."[1]

(*h*) **Under No-cure No-pay Contract.**—If a physician commences attending upon a patient, under a contract that if there is no cure there shall be no pay, he cannot recover for his services, or medicines, unless he shows a performance of the terms of the contract upon his part.[2] But a patient who pays a physician a certain sum to cure him of a certain disease on condition that if he failed to effect the cure the patient should submit to further treatment, cannot recover the amount agreed upon if he refused or neglects to submit to further treatment, even though the cure was not effected.[3] And it has been held that a physician who has undertaken to cure an habitual drunkard for a certain sum, may recover if the party returns to his habits of drunkenness, after a cure has been fairly effected, with the dishonest purpose of evading the contract.[4]

(*i*) **Under Conditional Contract.**—A conditional contract between a patient and his physician that if he effected a cure he should receive a reasonable compensation is valid.[5]

(*j*) **Effect of Intoxication of Physician.**—It is undoubtedly true that a physician or surgeon is not entitled to recover for medical services rendered while in such a state of intoxication that he could not exercise the skill and care required of him by law. But it is not a good ground of defence to an action on a

[1] Alder *v.* Buckley, 1 Swan (Tenn.), 69.
[2] Smith *v.* Hyde, 19 Vt., 54.
[3] Madison *v.* Mangan, 77 Ill. App., 651.
[4] Fisk *v.* Townsend, 7 Yerg (Tenn.), 146.
[5] Mock *v.* Kelly, 3 Ala., 387.

physician's bill that the physician had been intoxicated in the past, if, after such intoxication, the patient kept the doctor as his family physician.[1] One cannot object to a doctor's bill on account of past intoxication when he keeps him as a family physician for years afterward.[2]

(*k*) **Right of Consulting Physician to Compensation.** —A patient is liable for the fees of a consulting physician as well as for those of the regular physician in attendance.[3] This is so well settled, that a physician who is called to a consultation by an attending physician for his own benefit, in accordance with an agreement between the latter and his employer that the attending physician shall pay the expense of the consultation, can recover for his services from the employer under an implied contract, notwithstanding the agreement.[4] But a physician cannot recover in an action for his consultation fee where there was no evidence that he rendered any services, or at anybody's request, except as it might be inferred from his visiting the patient in company with her regular physician.[5] Visits made by physicians employed after one physician is called in and attends regularly on a case do not necessarily rank as "consultations," so as to entitle one to compensation as for a consultation.[6] As was said in a case in Louisiana: "As to the pretention that from the moment more than one physician is called in and attends regularly upon a case every visit made by every physician employed takes rank as a consultation, it cannot be listened

[1] McKleroy *v.* Sewell, 73 Ga., 657.
[2] Nelson *v.* Harrington, 72 Wis., 591.
[3] Sherman's Estate, 6 Pa. Co. Ct., 225.
[4] Shelton *v.* Johnson, 40 Iowa, 84.
[5] Schrader *v.* Hoover, 87 Iowa, 654.
[6] Succession of Haley, 50 La. Ann., 840.

to, even supposing that the physicians actually meet at the patient's bedside. The difference of the charge for what is technically styled a consultation, and for a simple visit, would make it ruinous to most patients and unreasonably onerous to all, to avail themselves of the lights of more than one of the faculty in time of need."[1]

(*l*) **For Services Rendered by Students and Assistants.**—Physicians and surgeons are entitled to recover compensation for the services of their students in attendance upon their patients even though the students are not licensed to practise medicine,[2] and for the service of such assistants as he may require.[3]

(*m*) **For Medicine Furnished.**—A physician who sells drugs apart from his professional business as a physician, as is common in country places, may recover for them, as a physician is not bound to furnish medicines to his patient, but, in case he does so, he may charge for them and recover the value thereof from the patient. Such is not the case, however, with surgical instruments which are a necessary aid to the practice of surgery and are the surgeon's personal property. An unlicensed practitioner is not entitled to recover a demand claimed by him for medicine furnished, in which evidently is included compensation for his services.[4] As was said by Chief Justice Savage in an early New York case: "He [the physician] was sent for after other physicians could do no more. He came and prescribed for the patient, and cured her by the use of two phials of medicine and a box of ointment. What the medicines were the witness knew not. She was asked the value not of the

[1] Succession of Duclos, 11 La. Ann., 406.
[2] People *v.* Monroe Common Pleas, 4 Wend., 200.
[3] Board of County Commissioners *v.* Brewington, 74 Ind., 7.
[4] Underwood *v.* Scott, 43 Kan., 714.

medicines simply, for her answers show that she estimated the value of the services of the physician as worth $16 or $18, because the patient was cured. The medicine at an apothecary's shop would probably have been worth only a few shillings, but here the witness and the jury undoubtedly estimated the services of the physician. Where the same person officiates as physician and apothecary, he comes within the decision of this court, that an unlicensed practitioner is incapable of suing for services rendered, or medicines furnished, as a physician. As the patient was cured, it is to be regretted that B—— was not paid; but if unlicensed pretenders to skill in diseases can recover, as in this case, the statute may become a dead letter; the country will be filled by mere quacks, peddling their nostrums, and deceiving and destroying the ignorant and the credulous, the very mischief which the statute is intended to prevent. I do not say that B—— is a mere pretender, for he cured his patient, and in honor and honesty should have been paid; but it is our duty to administer the law."[1] An interesting case on the right of an unlicensed physician to recover the value of drugs furnished to a patient is that of Underwood *v.* Scott, 43 Kans., 714, in which Justice Green in the course of his opinion said: "Can the plaintiff recover for the medicine alone, having furnished it as an attending physician? The statute in question forbids anyone from practising medicine for reward or compensation without having the qualification prescribed therein. The object of this law, doubtless, was to prevent unauthorized and unqualified persons practising, and the statutes should not be so construed as to give a person the privilege of exercising a right which is in violation

[1] Allcott *v.* Barber, 1 Wend. (N. Y.), 526.

of any of its provisions. To hold that a person who furnished medicine, as a physician, could recover compensation for the medicine so furnished or prescribed, would, in our judgment, render the statute nugatory, and any authorized person might prescribe for a patient and simply charge for his medicine and thus defeat the very object of the law. The practice of medicine may be said to consist in three things: (1) In judging the nature, character, and symptoms of the disease; (2) in determining the proper remedy for the disease; (3) in giving or prescribing the application of the remedy to the disease. If the person who makes the diagnosis of a case also gives the medicine to the patient, he is, in our judgment, practising medicine within the provision of the statute in question; and if unauthorized to practise or is in violation of the provisions of the statute, he is not entitled to compensation for the medicine, which he furnishes at the time, as a physician; and the instruction of the court, which said to the jury that the (physician) could recover for the medicine furnished, though he might not have been entitled to practise medicine, was erroneous."

(*n*) **For Services Rendered on Sunday.**—By the laws of several of the States, a person who makes a contract in violation of the statutes for the observance of the Lord's Day cannot maintain an action upon it. These statutes except from their operations work of necessity which includes work which is morally fit and proper to be done on the Lord's Day, and the courts have held that the services of a physician come within this exception.[1]

(*o*) **Physician Attending Physician.**—Where a physician seeks to recover for professional services rendered

[1] Aldrich *v.* Blackstone, 128 Mass.. 148.

another physician, evidence that it is not the custom to charge for attendance in such cases is admissible. In a suit by one physician against the estate of another, for professional services rendered the decedent, it is error to reject the offer to prove a custom among physicians in the place of contract not to charge for attendance of one physician on another, and that, as a matter of professional ethics, it was regarded as improper and unprofessional for one physician to charge another for his attendance. Such evidence being proper for the consideration of the jury along with the other evidence in the case.[1]

(*p*) **Where Illness Prevents Performance of Contract.**—A patient is released from his promise to pay for professional services and medicine to be rendered in the future by a physician, where the latter is not capable through illness to render the services or furnish the medicines when called on.[2]

(*q*) **For Services in Aid of Personal Injury Action.**—A physician cannot recover fees from a firm of attorneys, the amount of which is based upon the fact that the client contemplated bringing an action for personal injuries, and that in such action, because of his having rendered medical services, he might be called as a witness or be instrumental in effecting a compromise.[3]

2. WHO ARE LIABLE FOR COMPENSATION

(*a*) **Liability of Patient.**—(1) *In General.*—The law implies a promise on the part of a patient to pay what the services of the physician are reasonably

[1] Bremerman *v.* Hayes, 9 Super. Ct., 8.
[2] Powell *v.* Newell, 59 Minn., 406.
[3] Henderson *v.* Hall, 87 Ark., 1. See also Chapter IX.

worth.[1] What is the reasonable worth of the services is for the jury to determine under all the circumstances of the case.

(2) *For Fees of Consulting Physician.*—A physician who is called to a consultation by an attending physician for his own benefit in accordance with an agreement between the latter and his employer that the attending physician shall pay the expense of the consultation can recover for his services from the employer under an implied contract, notwithstanding the agreement.[2]

(3) *For Emergency Services Rendered While Unconscious.*—It is well settled that an insane person, an idiot, or a person utterly bereft of all sense and reason by a sudden stroke of accident or disease may be held liable, in assumpsit, for necessaries furnished to him in good faith while he is in that unfortunate and helpless condition. And the reasons upon which this rest are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstances that in such cases there can be no contract or promise, in fact, no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant an actual contract, but a contract and promise said to be implied by the law. Hence, physicians may recover for emergency services rendered one while unconscious.[3]

(4) *Liability of Infants.*—There are some contracts manifestly for the benefit of the infant where it would

[1] Dickey's Succession, 41 La. Ann., 1010; 6 So., 798; Prince *v.* McRae, 84 N. C., 674.

[2] Shelton *v.* Johnson, 40 Iowa, 84; Sherman's Estate, 6 Pa. Co. Ct., 225; Garry *v.* Stadler, 67 Wis., 512; 30 N. W., 787.

[3] Sceva *v.* True, 53 N. H., 627; Cotman *v.* Wisdom, 83 Ark., 601; Boyd *v.* Sappington, 4 Watts, 247; Starrett *v.* Miley, 79 Ill. App., 658.

be detrimental to his interests not to be bound by them. Such contracts the law holds as binding as contracts between adults. These contracts have to do with the existence and proper maintenance of the infant, and he might suffer severely if he could not pledge his credit for the supply of necessaries to himself.

"Necessaries" in the technical sense means such things as are necessary to the support, use, or comfort of the person of the minor, as food, raiment, medical attention, etc.

It has been held that even though a parent is unable to supply medical attention to a child living with him the child will not be liable on his own contract. The court said: "When necessary professional services are rendered to a minor son residing in the house of his father, the legal inference is that the father is the person liable therefor. . . . No implication can arise against a minor residing with his father and delivering over to him his wages, that he promised to pay for it." A physician does not necessarily have to prove an express contract with an infant for necessaries furnished him; it is sufficient if it is shown that the necessaries were in fact furnished him and enjoyed by him.

(*b*) **Liability of Third Persons.**—(1) *In General.*—In order that a physician may maintain an action against a third party to recover for professional services rendered another, he must show a promise by such third party, either express or implied, to pay therefor.[1]

(2) *Liability of Husband for Attendance upon Wife.*—It is an unquestionable rule of law that a husband is bound to provide his wife with necessary

[1] Crane *v.* Baudouine, 55 N. Y., 256.

lodging, clothing, and subsistence, and, in case of her sickness, medicines and medical attendance; and if he fails to make such provision she may obtain the same on his credit, and the person so making it may sue the husband and recover therefor.[1] When a physician is employed to attend upon a sick wife his employment continues while the sickness lasts, and the relation of patient continues unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician.[2] And a husband is liable for medical services rendered the wife, at her request, while the two are living apart under an agreement that the wife should have an allowance for support if the physician had no knowledge of such matter.[3] The right ceases, however, with divorce.

(3) *Liability of Wife for Attendance upon Husband.*—The later cases seem to hold that if a husband is penniless and the wife has property she can be made to provide him with necessaries. The liability of a widow for medical services rendered her husband in his last sickness, under a statute binding the property of both equally for such family expenses, is not discharged by failure to present a claim therefor against the estate of the husband in time to hold it, since husband and wife are made liable as principals by the statute.[4]

(4) *Liability of Parent for Attendance upon Child.*—The true rule, both in reason and on principle, is that a parent is legally, as well as morally, bound to provide medical attention for his children, if they are unable to care for themselves, and if he is able to do

[1] Washburn *v.* Washburn, 9 Cal., 475.
[2] Potter *v.* Virgil, 67 Barb., 578.
[3] Lawrence *v.* Brown, 91 Iowa, 342.
[4] Vest *v.* Kramer (Iowa), 114 N. W., 886.

so; and if he neglects so to do, and another performs the duty for him, even against his wish or directions, he may recover therefor from the father without regard to any idea of a contract in fact. There are numerous cases in favor of this view which we deem too many to cite for the purpose of this book. Some of the cases seem to recognize that there is only a moral obligation on the part of the parent to furnish such services, but that this moral obligation is sufficient to impose the legal liability for necessaries upon the parent; but the right and proper ground upon which the parent should be held liable is that it is a legal obligation. Thus it has been held that a father is legally liable to a physician for the latter's services in professionally treating the minor daughter of said father, dangerously attacked with typhoid fever, who at the date of the treatment was seventeen years old and was then and had been residing away from her father's house for three years prior to the rendition of such services, earning and controlling her own wages, and providing herself with clothing, at a place thirty miles distant from her father's place of residence, the father not furnishing or agreeing with his daughter to furnish her with any money or means of support but consenting to her absence from home; even though rendered at the request of the daughter and furnished without the knowledge or consent of the father.[1] But a surgical operation of doubtful success upon a child has been held not to be a necessity for which a non-assenting father is liable, upon an order given to the surgeon by the wife.[2] There is a conflict of authority on the question of the duty of a mother, who is a widow, to maintain

[1] Porter *v.* Powell, Ia.

[2] Detwiler *v.* Bowers, 9 Super. Ct., 473.

her minor children. In some States[1] it has been held that she is liable; in others[2] the contrary is held. A step-father is not obliged to furnish necessaries to his step-children.[3] It has been held that the father's duty of maintenance does not pass to the mother on divorce.[4] In some States the mother may recover from the father for necessaries furnished by her if the divorce was for his aggression,[5] but not if granted for her aggression.[6] The obligation on the part of the parent to furnish medical services to the child continues until the child is in a condition to provide for its own maintenance and no farther. The legal obligation ceases, except under some statutes, as soon as the child reaches the age of majority, however helpless he may be, and however wealthy the father may be.[7] A physician cannot recover from a father for services rendered an adult daughter at her request, although she resides with him as a part of his family.[8] Neither can a physician recover for medical services rendered a child who had been taken into the defendant's family.[9]

(5) *Liability of Child for Attendance upon Parent.*— A child is under no legal obligation at common law to support his parents, even though they are destitute and infirm. There is a strong moral obligation, but no such duty is recognized by the law, unless, as is the case in some jurisdictions, the duty is expressly

[1] So held in Connecticut, Missouri, and New York.
[2] Alabama, Illinois, Massachusetts, and Minnesota.
[3] Bloomfield Twp. *v.* Chagrin Twp., 5 Ohio, 315.
[4] Conn. *v.* Conn., 57 Ind., 323; Courtright *v.* Courtright, 40 Mich., 633; Thomas *v.* Thomas, 41 Wis., 229.
[5] Pretzinger *v.* Pretzinger, 45 Ohio St., 452.
[6] Fulton *v.* Fulton, 52 Ohio St., 229.
[7] 2 Kent. Comm., 190, 191.
[8] Blachley *v.* Laba, 63 Iowa, 22.
[9] Holmes *v.* McKim, 109 Iowa, 245; 80 N. W., 329.

imposed by statute. While they are entitled to the child's wages during its minority, the relation which the child bears to them imposes no legal duty of maintenance, and no promise on the part of the child to pay even for necessaries furnished them will be implied. In some States it is made the duty of children of any poor person unable to maintain himself to maintain such person to the extent of their ability. Generally, a mode of enforcing such liability is prescribed by statute. If no mode is provided, one who renders medical services to a person within the terms of the statute, whose son, though able, neglected and refused to maintain him, may recover therefor from the son.

It has been held in a New York case that a son who summoned a physician to attend his father without disclosing that he acted as agent is liable for the services rendered.[1] The New York case, however, hinged on the manner in which the request was made: "Doctor, I want you to come and attend my father;" not that the father wanted the doctor to come, or that the son was acting as messenger. In a Kansas case a son came to a physician and called for his services, without specifying to whom or on whose account they were rendered. The physician went to his house and treated the father, who was at that time a member of his son's household, expecting the son to pay for the services. Later he presented the bill to the son, who promised to pay it, but later refused to do so on the ground that he was not liable for services performed for his father. The court in rendering its opinion said: "It is true the person to whom the services were rendered was an adult person, the father of the defendant, and only tempo-

[1] Foster *v.* Meeks, 18 Misc., 461.

rarily a member of the defendant's family. But, prima facie, the head of a family is responsible for all debts which he contracts for any member of the family. If the son called the physician to render service to any member of the family, the latter has a right to look to the former for his compensation, in the absence of notice that someone else was responsible; and while a child may be under no legal obligation to support an aged parent, yet if he does receive him into his family he is, prima facie, responsible for services which he calls upon strangers to perform for the benefit of such parent."

(6) *Liability of Son-in-law for Attendance on Mother-in-law.*—The facts that a son-in-law was at the bedside of his dying mother-in-law, rendering such services as he could, that he knew the physicians who were attending her, and said nothing, have been held insufficient to render him liable for their services, there being no evidence that he employed or acquiesced in the employment of the physicians who subsequently sued him therefor. Especially is this true where the estate left by the patient was amply sufficient to pay such charges. Of course, if the son-in-law promised at the time, expressly or impliedly to pay for such services he would be liable on such promise.[1]

(7) *Liability of Brother for Attendance upon Brother.*—A brother is not liable, as such, for services rendered by a physician to a brother, even though the brother for whom the services were rendered was insane at the time.[2]

(8) *Liability of Master for Attendance upon Servant.*—An employer who merely summons a physician and requests him to care for an employee who has suddenly

[1] Madden v. Blain, 66 Ga., 49.
[2] Smith v. Watson, 14 Vt., 332.

become ill while engaged in his duties, and has been thereby rendered incapable of acting for himself, is not, in the absence of an express agreement between the employer and the employee that the former shall furnish medical aid to the latter, liable for the services of the physician rendered under such circumstances.[1] In the days of slavery, it was said "When one white man employs another to work for him, it is not an implication or incident that the employer shall pay the employee's physician's bills; it would require an express contract to create that obligation." There are authorities which hold parties liable in certain emergencies for the acts of their managers or foremen in employing physicians. These authorities, however, go no farther than to hold the parties liable for the immediate services made necessary by a present urgency. Authority to act is implied from the necessity of the case.[2] Neither the authorities nor reason carry the rule beyond the emergency. Such employment does not make the employer liable for the services rendered by the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him. The cases cited below, and others, are those in which the employment is hazardous, exposing the employees to dangers and risks greater than those in the ordinary pursuits of life. For example: "Railroad companies occupy a peculiar position with reference to such matters, exercising quasi-public functions, clothed with extraordinary privileges, carrying their employees necessarily

[1] Norton *v.* Rouke, 130 Ga., 600; 61 S. E., 478; Jesserich *v.* Walruff, 51 Mo. App., 270; Smith *v.* Watson, 14 Vt., 332.

[2] St. Louis, A. & T. R. Co. *v.* Hooves, 53 Ark., 377; Southern R. Co. *v.* Loughridge, 65 Ark., 300; Terre Haute & I. R. Co. *v.* McMurray, 98 Ind., 358; Louisville, N. A. & C. R. Co. *v.* Smith, 121 Ind., 353.

to places remote from their homes, subjecting them to unusual hazards and dangers. The law has by reason of the dictates of humanity and the necessities of the occasion, imposed upon such companies the duty of providing for the immediate and absolutely essential needs of injured employees when there is a pressing emergency calling for their immediate action. In such cases even subordinate officers are sometimes, for the time being, clothed with the powers of the corporation itself for the purposes of the immediate emergency, and no longer."[1] As has been said by the highest court in Kansas on more than one occasion: "There is no legal obligation resting upon the company to provide medical or surgical care for those who have been injured in its service, but the ground upon which the authority of the superintendent to make such contracts is inferred is that it is a reasonable thing for the company to provide for the care and cure of persons who are engaged in the hazardous employment of railroading."[2] It seems, however, that there is nothing to prevent the master from furnishing medical aid if he wishes to. Thus a railroad company may be held liable for services rendered an injured employee, where he was called in by the station agent, if upon due notice given to the general superintendent the act is not repudiated.[3] So the master is liable for medical attendance which he secures himself.[4] A promise to pay for medical services engaged by an employee without any authority for the benefit of a third person, when accompanied by a denial of any liability, does not constitute a ratifica-

[1] Chaplin *v.* Freeland, 7 Ind. App., 676, 34 N. E., 1007.

[2] Union Pac. R. Co. *v.* Beatly, 35 Kan., 265; Union Pac. R. Co. *v.* Winterbotham, 52 Kan., 433.

[3] Toledo W. & W. R. Co. *v.* Prince, 50 Ill., 26.

[4] Clark *v.* Waterman, 7 Vt., 76.

tion, but is a mere promise to pay the debt of another, which is void under the statute of frauds;[1] and a mere promise by an employer to pay for services previously rendered an employee or servant is not binding on the employer.

(9) *Illustrations of Liability or Non-liability of Master for Attendance on Servant.*—Upon the trial of a case brought by a physician in Missouri against a cooperage company for compensation for services rendered to an injured employee, the court of appeals, in rendering its opinion as to whether the company could be held liable for the physician's fees because of the fact that the superintendent of the company sent a messenger summoning him to the works of the company to attend such employee, said: "We take it that the law will not imply, upon this evidence, a contract either on the part of the corporation or on the part of Mr.—— (the superintendent) to pay for these services. The general rule, no doubt, is that where a person requests the performance of a service, and the request is complied with and the services performed, the law raises an implied promise to pay the reasonable value of the services. But this implication does not obtain where one person requests a physician to perform services for a patient unless the relation of the person making the request to the patient is such as to raise a legal obligation on his part to call in the physician and pay for the services. Where a husband calls in a physician to attend upon his wife, or where a father calls in a physician to attend upon his minor child, the law implies a promise on his part to pay the reasonable value of the services, because there is a legal obligation on his part, in either case, to furnish necessaries for the benefit of the

[1] Holmes *v.* McAllister, 123 Mich., 493.

patient. But no such implication arises where one calls in a physician to attend upon a stranger, or upon one to whom he is under no legal obligations."[1] An employer is not liable for the services of a physician summoned by his manager or foreman to attend to an employee in case of an injury by accident in a laundry during the employer's absence.[2]

(10) *Illustrations of Liability of Railroads for Attendance on Employee.*—As an illustration of the law that a railroad company cannot escape liability for medical services rendered an injured employee by setting up the lack of authority of its president or general superintendent, we quote an extract from the opinion of Justice Elliott of the Supreme Court of Indiana: "It would be unreasonable to require a surgeon to give professional assistance to a person injured by the company's trains, and then deny him compensation upon the ground that the superintendent had no authority to employ him because that authority was lodged in a chief surgeon. Nor are we willing to sanction a rule imposing upon the surgeons whose services are requested by the superintendent the duty of making specific inquiry as to the scope of the superintendent's authority. Such a rule would operate harshly in many cases, for if the surgeon must stop to make inquiries before leaving his home or office the injured man might perish. Better, railroad companies should be held responsible for the acts of such a high officer, although as between him and his principal that officer may usurp authority that is vested in a subordinate agent, than that a surgeon who obeys the summons of a superintendent should be compelled to go unpaid."[3]

[1] Meisenbach *v.* Southern Cooperage Co., 45 Mo. App., 232.

[2] Holmes *v.* McAllister, 123 Mich., 493.

[3] Cincinnati, I., St. L. & Chi. Ry. Co. *v.* Davis, 126 Ind., 99; 25 N. E., 878.

(11) *Liability of Vessels for Attendance upon Seamen.*—The right of seamen to be cured of sickness, or any injury received in the ship's service, at the expense of the ship is a rule regarded in the maritime law as forming part of the contract, and the decisions of the courts of the United States and of the States sanction the rule.[1]

(12) *Liability of Party Who Summons Physician.*—A stranger summoning a physician to care for another unable to act for himself is not liable as upon an implied contract for the reasonable value of the services so rendered.[2] "When a person is dangerously wounded, and perhaps unable to speak for himself, or suffering so much that he does not know how to do it, any person will run to the nearest surgeon in the performance of an ordinary office of humanity. If it were the law that the person so going for the surgeon thereby undertakes to become personally liable for the surgeon's bill, and especially for the surgeon's bill through the long subsequent course of treatment, many would hesitate to perform this office, and in the meantime the sufferer might die for the want of the necessary immediate attention."[3] In the case of Starrett *v.* Miley, 79 Ill. App., 658, a woman who was, so far as appears from the report of the facts, a stranger to Starrett, ran into his house, wounded and bleeding, and fell there unconscious. He at once called in Miley, a physician, and directed him to the injured woman and told him to care for her. Starrett also had her carried to a room in his house. No express promise was made by him to

[1] Holt *v.* Cummings, 102 Pa. St., 212.

[2] Cotnam *v.* Wisdom, 83 Ark., 601; 104 S. W., 164; Pray *v.* Stinsom, 21 Me., 402.

[3] Raoul *v.* Newman, 59 Ga., 408; Meisenbach *v.* Southern Cooperage Co., 45 Mo. App., 232; Meyer *v.* Supreme Lodge K. R., 178 N. Y., 63.

pay the physician for the services rendered the woman. It was held that Starrett was not liable for the physician's services. And in the case of Williams *v.* Brickell, 37 Miss., 682, where the proprietor of a summer hotel in which yellow fever suddenly broke out sent a telegram saying: "There are many cases of yellow fever at the Well; send out a physician this afternoon without fail." It was held that the hotel proprietor did not thereby render himself liable to the physician who attended the patients. But it has been held that where a person called at the office of a physician, and in the absence of the latter left his business card with "call on Mrs. D—— at No. 767 Broadway" written upon it, with a clerk in the office, requesting him to hand it to the physician and to tell him to "come as soon as possible," such person is liable for the physician's bill in attending such patient in response to the message.[1] The defendant in the case just cited relied on a prior New York case; but the court said: "In that case the defendant exhibited to and left with the plaintiff a telegram he had received, which, as well as the other facts and circumstances, clearly showed that he only acted as the agent of another party. In the case at bar, on the other hand, there was nothing on the card to indicate to the physician before he rendered the services that the defendant had called at his office at Mrs. D——'s request, and that he was therefore only acting as her messenger. The defendant might very readily have screened himself from all liability by simply writing the memorandum on a blank card, or adding to that which he wrote on his own card something that would have apprised the physician of the fact that he acted in the transaction as her agent. Having neglected to do this,

[1] Bradley *v.* Dodge, 45 How. Pr., 57.

the physician was, under the circumstances, justified in believing that he was employed and would be paid by the defendant." And when one calls upon a physician and says: "Doctor, I want you to come and attend my father; he had a doctor who was not satisfactory," he will be liable for the services rendered by the doctor in pursuance to such request.[1]

(13) *Liability of Corporations Where Physician is Summoned by Agent.*—A physician who deals with an agent of a corporation is bound to know the extent of such agent's authority. To do this, a physician should immediately upon being employed by an officer or an agent of a corporation to render services for some person injured by such company, write to some officer who has power to make such a contract, telling him that he has been employed by an inferior or subordinate agent of the company and that he has undertaken the treatment of the patient on behalf of the company and expects it to pay him for his services; and asking that the company notify him at once as to their position in the matter. A failure of the company to answer will amount to a ratification and holds them liable for the services rendered. The letter should be addressed to the president, general superintendent, or general manager of the company, as it is well settled that these officers have authority to employ a physician or surgeon to attend not only its injured employees but those to whom the company is liable for personal injuries. But it has been held in Ohio that a superintendent of a railroad company has no power unless specially invested with authority for that purpose, to employ a physician and bind the company for payment therefor in attending

[1] Foster *v.* Meeks, 18 Misc., N. Y., 461.

a passenger injured on the road.[1] Where the conductor of a street railway car brings an injured person to the office of a physician and directs him to attend such person the railway company is not liable to pay for the services, in the absence of any evidence to show authority on the part of the conductor to bind the company in such a case, or to show a serious or sudden emergency.[2] And it is pretty well settled that a conductor, section boss, or station agent of a railroad company are without authority to employ a physician to treat a person injured by their company.

(14) *Liability of Counties, Towns, etc., for Medical Services to Indigent Persons.*—The duty to care for paupers being purely statutory it necessarily follows that the liability of counties and towns for medical aid rendered to such persons is governed by the statutory requirements of the different States. The statutes in nearly all of the States provide in general terms for the furnishing of aid to these unfortunates, leaving to the local officers the duty of discerning whether or not aid is to be furnished in the particular case and if so to what extent relief will be granted; hence, these municipal corporations are not liable unless there is a contract to that effect, or the services are rendered at the request of the official whose duty it is to make such agreement. In Arkansas it has been held that the statutes for the aid of the poor implied no promise by the county to pay for services rendered by a physician or surgeon, even in cases of emergency, if there has been no judicial ascertainment that the person treated is a pauper; it being presumed that a physician's or surgeon's services to the poor and indigent are bestowed as a charity, or that he looks to the

[1] Columbia Street Ry. Co. *v.* Wiseman, 1 C. D., 134.
[2] Patterson *v.* Consolidated Traction Co., 48 Pitts. L. J., 4.

patient for his pay, and when such is his intent he cannot afterward charge the county with liability.[1] In Illinois it has been held that a physician who has rendered medical aid to a person coming within the Pauper Act, must, in order to recover from the county upon an implied assumpsit, show notice to the overseer of the poor of the necessity for the rendition of the services and a refusal or neglect by him to act.[2] In Massachusetts, "towns are under no moral obligation to pay for the support or cure of paupers, especially of such as have their legal settlement in other towns. The legal obligation is created by statute, and it exists and can be enforced only according to the provisions of the statute. The town is answerable to an individual only when the overseers have been applied to and until they shall furnish the supply.[3] In Nebraska it has been held that a physician who without any solicitation or direction of anyone having authority to create an indebtedness against the county, and before any application had been made to the overseers of the poor or to the county board for aid, attended for about a month a non-resident indigent person who fell sick within the county while the county board was in session, cannot recover of the county the value of the services.[4] In North Carolina it has been held that in order to render the county liable for services rendered an insolvent smallpox patient there must be an express request of the proper county officer for the rendition of such services.[5] In Pennsylvania a physician and surgeon who renders

[1] *Arkansas*—Cantrell *v.* Clark County, 47 Ark., 239.

[2] Diffenbacher *v.* County of Mason, 117 Ill. App., 103.

[3] Kittredge *v.* Newbury, 14 Mass., 448.

[4] Hamilton County *v.* Meyers, 23 Nebr., 718; 37 N. W., 623; Hamilton County *v.* Raben, 23 Nebr., 723; 37 N. W., 626.

[5] Copple *v.* Davie County, 138 N. C., 127; 50 S. E., 574.

professional services in a case of emergency on the credit of his patient who fails to pay the bill, and who, afterward, admits himself to be a pauper, cannot recover for such services from the directors of the poor.[1] In Wisconsin the supreme court of that State has said: "There is no more reason for holding that a physician may aid a pauper, upon the supervisors of the town in which such pauper has a legal settlement neglecting their duty, and hold such town liable therefor, than for holding that one may repair the highways of a town because its supervisors neglect their duty in that respect, and recover of such town therefor."[2] On the other hand, it has been held that the county, town, or poor district upon which is imposed the duty to relieve indigent persons is liable for medical aid furnished such persons without notice to or request from the proper official; the reason for the ruling being that in the event of non-compliance with any of the statutory requirements the patient must suffer from typhoid fever or any other malignant disease, without the relief of medical aid, unless some humane physician should see fit to render his services gratuitously; and if one should be stricken down with apoplexy on the highway, let the physician wait until the overseer could be found, and an order written with ink and paper authorizing the physician to assist to the amount as might appear to the overseer to be sufficient for the emergency.[3] Thus it has been held that the physician could recover from the county for necessary medical services rendered by him where prompt and immediate action was required, without notice to or permission from the

[1] Blakeslee *v.* Chester County Directors of Poor, 102 Pa., 274.
[2] Patrick *v.* Town of Baldwin, 109 Wis., 342.
[3] County of Fayette *v.* Morton, 53 Ill. App., 552.

overseer of the poor.[1] And a physician who has rendered necessary services, in an emergency, to a minor whose mother is dead and whose father is idle and worthless and does not provide for his children, may, in the first instance, maintain an action against the county for such part of his bill as the county is liable to pay, although he has property sufficient to pay part of the bill.[2] A physician in Iowa who attended poor persons afflicted with contagious diseases at the direction of the mayor and presented his bill for services rendered to the local board of health, which they approved, was held to be entitled to reasonable compensation for the services from the county, even though the same were performed without legal sanction.[3] In a Minnesota case the court said: "It is true that the obligations to provide for the poor are statutory. These, as we have indicated, are matters of regulation. But where there can be no regulation from the very nature of the case, it must be that necessity will supersede the exercise of statutory authority and immediate aid for the sick person should be furnished. A deprivation of it might inure not only to injure the poor person but to the detriment of the public, for delay in the treatment of the injured party might entail added pecuniary burdens."[4]

(15) *Effect of Statute of Frauds on Liability of Third Person.*—The safest way to save all question when a third person desires to be responsible for services rendered is to have him put his promise to pay in writing. This is because in most States they have a statute known as the Statute of Frauds, which

[1] Clinton County *v.* Pace, 59 Ill. App., 576.
[2] Christian County *v.* Rockwell, 25 Ill. App., 20.
[3] Hoskins *v.* Woodbury Co., 146 Iowa, 165.
[4] Robbins *v.* Homer, 95 Minn., 201; 103 N. W., 1023.

provides that no action shall be brought to charge a person upon any promise to answer for the debt of another unless it is in writing. What form of words shows an intention to assume a primary liability for the debt of the patient to the physician cannot be determined in advance by arbitrary rules. Promises to "see that P. is paid," that "P. will get his pay," to "see him through," referring to the patient, are held to imply a promise to pay the debt of another, and the promise must be in writing. But if the third party says, "Attend such a patient and I will pay you," the promise is not within the statute and does not need to be in writing. Thus the expression "Doctor, I want you to come and attend my father," has been held to render the son personally liable for such services. "The real character of a promise does not depend altogether upon the form of expression but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a direct or a collateral promise.[1]"

3. AMOUNT OF COMPENSATION

(*a*) **Under Express Contract.**—The right of a physician to compensation under an express contract for his services is limited to the amount agreed upon by the parties.[2] A contract to pay a physician from $200 to $400 for the performance of a surgical operation is binding and valid for $200 and the value of the services up to $400 upon proof of such value.[3]

[1] Davis *v.* Patrick, 141 U. S., 479.

[2] Perry *v.* Woodbury, 44 N. Y. St. Rep., 287; Thomas' Estate, 6 Pa. Co. Ct., 642.

[3] Doyle *v.* Edwards, 15 S. D., 648.

(*b*) **Under Implied Contract.**—The employment of a physician without an express agreement as to the compensation, raises an implied contract to pay what the services are reasonably worth.[1] Physicians called upon to render services in the physical examination of one who claimed to have been injured by the negligence of a railroad company, and whose claim was subsequently compromised without going to trial, are entitled to recover the value of their services, without enhancement because at the time they were rendered it was supposed that they might have to attend court as witnesses.[2] In a case where the testimony showed that the physician, while he attended his brother, at whose house he was living as a member of the family, did not devote all his time to his brother, it was held that he could not recover for brotherly attentions given his deceased brother. The court saying: "The most the claimant is entitled to is to be paid for the professional visits made, and the number of operations performed by him, at the usual rate of practising physicians."[3] A physician who informed his brother that his charge for attending him would be merely nominal, will not be permitted to recover an excessive amount from the brother's estate after his decease.[4]

(*c*) **As Affected by the Patient's Financial Condition.**—There is a conflict in the authorities as to whether it is proper to prove the value of the estate of a person for whom medical services were rendered or the financial condition of the person receiving such services.[5] In some jurisdictions the financial

[1] Peck *v.* Martin, 17 Ind., 115.
[2] Henderson *v.* Hall, 87 Ark., 1.
[3] In re Moffett's Estate, 32 Leg. Int. (Pa.), 218.
[4] Trites' Estate, 14 Phila., 248.
[5] Cotnam *v.* Wisdom, 83 Ark., 601; 104 S. W., 164.

condition of the patient cannot be considered,[1] except there is evidence proving that it was customary for physicians to graduate their charges by the ability of the patient to pay.[2] In Robinson *v.* Campbell, 47 Iowa, 625, it was said: "There is no more reason why this charge should be enhanced on account of the ability of the defendants to pay, than that the merchant should charge them more for a yard of cloth, or the druggist for filling a prescription, or a laborer for a day's work." On the other hand, it has been held by the courts in some States that the financial condition of the patient may be considered.[3] Whatever may be the true principle governing this matter in contracts, the financial condition of a patient cannot be considered where there is no contract and recovery is sustained on a legal fiction which raises a contract in order to afford a remedy which the justice of the case requires.[4]

(*d*) **As Affected by Nature of Ailment.**—It may be seen at a glance that a call to perform an operation or services rendered in an obstetrical case ought to be rewarded by a larger fee than the ordinary call, and so the law wisely recognizes the right of a physician or surgeon to graduate his charges according to the character of his services. It has been held that a rule of a county board which fixes a fee of one dollar per visit for medical aid furnished to patients under a Pauper's Act is unreasonable when made to apply to all cases regardless of the nature of the ailments to be treated and the character of the services to

[1] Morrissett *v.* Wood, 123 Ala., 384; Cotnam *v.* Wisdom, 83 Ark., 601; 104 S. W., 164; Robinson *v.* Campbell, 47 Iowa, 625.

[2] Morrissett *v.* Wood, 123 Ala., 384; 26 So., 307; Lange *v.* Kearney, 9 N. Y. St., 793.

[3] Haley's Succession, 50 La. Ann., 840; 24 So., 285; Lange *v.* Kearney, 24 N. Y. S. R., 262, affirmed in 127 N. Y., 676; 28 N. E., 255.

[4] Cotnam *v.* Wisdom, 83 Ark., 601; 104 S. W., 164.

be rendered. Many cases might arise, so serious, dangerous, or disagreeable in their nature, that no physician, of whatever skill or experience, would be willing to undertake them, because of the inadequacy of the compensation fixed.[1]

(*e*) **As Affected by the Skill of the Physician.**—The law, as a rule, sets no limitation to fees provided they be reasonable. Within this rule a practitioner is allowed discretionary powers and may charge more or less according to his own estimate of the value of his services. No one will pretend to assert that all services are of equal value, and no one will claim that those who can render them more skilfully should receive only the same reward as those who can render them the least so. A medical man of great eminence may be reasonably entitled to a larger recompense than one who has not equal practice, after it has become publicly known that he expects a larger fee, inasmuch as the party applying to him must be taken to have employed him with a knowledge of this circumstance.

(*f*) **As Affected by Loss of Other Practice.**—A physician who, at the request of a patient, agrees for a time to abandon his other practice and devote himself exclusively to the one patient, and does so, rendering unusual services, is not restricted in the amount of his compensation to the usual charges made by physicians charging by the visit, but, in estimating the amount of compensation, the witnesses may take into view the nature of the contract, and the fact that the physician would probably sustain loss in other practice, though his actual loss would not be a proper subject for consideration.[2] But a contract

[1] Dieffenbacher *v.* County of Mason, 117 Ill. App., 103.
[2] Patterson *v.* Head, 1 Lea. (Tenn.), 664.

to pay more than the actual value of services rendered is unusual, and a construction should not be given to a physician's contract for services which would give him compensation for loss of business while absent from his office in addition to compensation for his services, unless the language employed is capable of no other construction, and testimony, that a promise to pay such double compensation was made, must be well supported by facts and circumstances to sustain a recovery.[1] Where a physician was summoned from a distance to attend his aunt not in a professional capacity, but as an adviser in business matters, and on his arrival he rendered valuable professional services which were accepted by the aunt, he is entitled to compensation. But not having been summoned professionally in the first instance, he cannot in estimating his services claim for loss of home practice.[2]

(*g*) **In Cases of Epidemics.**—In cases of epidemics of smallpox, yellow fever, and the like, physicians are justified in charging higher fees, but the courts will not uphold exorbitant fees on that ground.[3]

(*h*) **Right to Collect Interest on Claim.**—The right of a physician or surgeon to collect interest on claims due for professional services rendered depends in a large degree upon the wording of the statute in the State in which they practise. Thus in Georgia it has been held that a physician was entitled to interest under a statute providing that the accounts of "merchants, tradesmen, and mechanics" should have interest. The court said: "The word 'tradesman' does not, perhaps, ordinarily cover physicians; but they have a trade, an art, a mystery. They usually give

[1] Burke *v.* Mulgrew, 127 App. Div. (N. Y.), 733.
[2] Succession of Dickey, 41 La. Ann., 1010.
[3] Collins *v.* Graves, 13 La. Ann., 95.

it a more dignified name, to wit: Profession. One of the definitions of trade given by Webster is, 'The business a man has learned by which he earns his livelihood.'"

Where interest is allowed generally on accounts, it seems that the physician is entitled to interest on his claim for services from the time such claim becomes due.

4. ACTIONS FOR COMPENSATION

(*a*) **Limitation of Actions.**—The first question that presents itself to the mind of the lawyer when handed an account to collect is: Is it barred by the statute of limitations? That is, has it been outlawed? This important fact must be kept in mind by the physician and he must see to it, at his peril, that he gets his claim into a judgment, or secures a note or some security against which the statute does not run in as short a period of time as it does against the open account.

Because of the fact that the statutes of limitation vary so greatly in the different States, we will have to leave it with the reader to look up in his statutes the period of limitation upon accounts. The general statute applicable to other simple contracts applies to contracts of physicians.

In case the first items of the account are found to be barred, but the later items are not, the only safe course is to consult an attorney, for the decisions of the several States are in conflict as to whether this bars the whole account or only part of it, or whether a payment made upon the account does not take the earlier charges out of the operation of the statute. The decisions are so conflicting, and the

question such a close one, that the only safe way to do is to leave it to an attorney, who can advise what the legislature and the courts in the several States have said upon this subject. After the claim is in a judgment, it should be remembered that unless execution is issued ever so often (in some States five years) the judgment will become dormant.

(*b*) **When Fees are Due.**—In ordinary cases no date for payment is stipulated by the physician; when this is done, however, payment is due on the stipulated date, and a refusal to pay gives the physician an immediate right of action. In the great majority of cases where no payment is fixed by the parties the law implies a contract to pay upon the rendition and completion of the services.

(*c*) **Right to Set Up Malpractice as Defence.**—A failure to exercise due care or ordinary skill, resulting in injury to a patient, may be pleaded as a defence to an action by the physician for the value of his services,[1] but the defence of recoupment must be pleaded especially.[2]

(*d*) **Intoxication as Defence.**—Intoxication sufficient to render a physician or surgeon incompetent to perform his duty is a defence to an action for compensation for services rendered; but one who knows the intemperate habits of a physician cannot set up such a defence when he continues to employ him.[3]

(*e*) **Evidence.**—(1) *In General.*—A physician who brings an action to recover the value of services rendered as a physician to a defendant at his request must prove by testimony that he is a physician, that he was employed as such by the defendant, that he

[1] Howell *v.* Goodrich, 69 Ill., 556; Vandenberg *v.* Slagh, 150 Mich., 225.
[2] McLure *v.* Hart, 19 Ark., 119.
[3] McKleroy *v.* Sewell, 73 Ga., 657.

rendered the services alleged, and the value of such services. He is not bound to prove the value of the services to the defendant; they may save the defendant's life or they may effect no cure; or a cure may follow without aid from the services. In the first case the value of the services can hardly be measured; in the other they are of no value.[1]

(2) *Proof of Authority to Practise Medicine.*—While there is some conflict of opinion on the necessity of a physician suing to recover for his professional services to show affirmatively his compliance with the law, the weight of authority and reason seem to be in favor of the rule that when the question of license or qualification of a physician arises collaterally in a civil action for his compensation for services rendered the license or due qualification under the statute will be presumed. But it is safer to be prepared before the trial to prove the possession of the qualifications required by law.[2] The reason why the license will be presumed, when there is no evidence to the contrary, rests upon the principle that when an act is required by positive law to be done, the omission of which would be a misdemeanor, the law presumes that it has been done, and therefore the party relying on the omission must make proof of it although it be a negative.[3] On the other hand the courts of Alabama, Georgia, Delaware, Indiana, and New Jersey have held that the effect of these "license acts" was to prohibit the practising of medicine by all persons unless they were licensed by the proper authority in their State or their names registered

[1] Styles *v.* Tyler, 64 Conn., 432.

[2] Williams *v.* People, 20 Ill. App., 93; Leggatt *v.* Gerrick, 35 Mont., 91; McPherson *v.* Cheadell, 24 Wend., N. Y., 15; Webster *v.* Laub, 15 S. D., 292; 89 N. W., 473.

[3] Chicago *v.* Wood, 24 Ill. App., 40; Leggatt *v.* Gerrick, 35 Mont., 91.

as required by the statute, and unless it was proved that the persons rendering such services were not within the prohibition of the statute they cannot recover in actions founded on contracts for medical services.[1] In South Carolina it has been held that the physician's right to practise is presumed unless the patient or the party sued gives him reasonable notice that proof of his qualifications will not be required.[2]

(3) *Proof as to Skill and Care.*—When the defendant in an action by a physician to recover the value of professional services relies upon evidence of want of ordinary care and skill in the treatment of the case in defence of the action and by way of counter claim for damages the burden of proof in establishing such negligence rests upon him. The theory of the law which holds the physician to a contract to use ordinary skill implied as an incident to the contract of employment does not make the performance of such implied contract such an element of his right of action that it must be alleged in his complaint. The disproof of the actual acts and omissions necessary to show that ordinary skill has not in fact been exercised in a particular case is not a part of the physician's case in chief.[3]

(4) *Proof of Employment.*—It is the duty of the physician who is suing for his compensation for medical services rendered to prove by testimony that he was employed as a physician or surgeon by the defendant, whoever that individual or corporation may happen to be.[4]

[1] Mays *v.* Williams, 27 Ala., 267; Adams *v.* Stewart, 5 Harr. (Del.), 144; Bower *v.* Smith, 8 Ga., 74; Cooper *v.* Griffin, 13 Ind. App., 212; Dow *v.* Haley, 30 N. J. L., 354.

[2] Crane *v.* McLaw, 12 Richardson (S. C.), 129.

[3] Styles *v.* Tyler, 64 Conn., 432.

[4] Styles *v.* Tyler, 64 Conn., 432.

(5) *Proof of Services Rendered.*—Not only must the physician, who brings an action to recover the value of services rendered prove that he was employed by the defendant as such but that he rendered the services alleged.[1] A physician is not required, however, to prove in an action for his services the necessity of making the number of visits for which he seeks compensation.[2]

(6) *Admissibility of Books of Account to Prove Charges for Services Rendered.*—Books of account are held in most States to be competent evidence to prove charges for professional services rendered by a physician, and as admissible in evidence as those of a trader or merchant.[3] The books of account may be used in court for two purposes: (1) Merely to refresh the mind of the physician while he is testifying as to the services and charges of which they contain a record; (2) as evidence themselves to prove the claim. The general rule is that books of account may be used by the witness merely to refresh his memory. This account book is the book in which every physician should keep the daily register of all his business, and the items should be charged thereon on or near the day during which the services were rendered in order to make it competent as evidence. The form of the book is immaterial provided it be regularly kept as a book of original entry. It is not necessary that the entry be made at the very moment the service was rendered. It has been held that entries transferred from a slate to a book from one to three days after the transaction does not render the book inadmissible as a book of original entries. The charges on the slate

[1] Styles *v.* Tyler, 64 Conn., 432.
[2] Ebner *v.* Mackey, 186 Ill., 297.
[3] Foster *v.* Coleman, 1 E. D. Smith, 85.

being held to be mere memoranda and not intended to be permanent, and the delay not so great as to justify the exclusion of the book on the ground that its entries were not original. The book account of a physician should not contain lumping charges. Therefore in an action to recover on a book account for medical services rendered, where the copy of the account filed contains lump charges, judgment for want of a sufficient affidavit of defence will be refused.[1] But it has been held unnecessary to specify in a bill of particulars the exact price of each service rendered.[2] The charges made by a physician in his book of original accounts for professional services are not conclusive of the value; and where an affidavit of defence sets out that such charges are excessive the case must go to the jury.[3] And on the trial of an action for professional services the jury are the judges of the credibility of the physician's books of account and may disregard a claim which appears to them excessive or unreasonable.[4] Proof that the physician's books were honestly and correctly kept must be proved as a preliminary to receiving the books in evidence. The mode of proving this varies in different jurisdictions. The New York rule governing the admission of a party's books for the purpose of sustaining his claim in an action to recover for professional services as a physician claimed to have been rendered the defendant by the plaintiff's intestate is as follows: "They ought not to be admitted where there are several charges, unless a foundation is first laid for their admission, by proving that the party had no clerk, that some of the articles charged have been

[1] Davidson *v.* Geddes, 1 W. N. C. (Pa.), 9.
[2] Van Bibber *v.* Merrit, 12 W. N. C., 272.
[3] Thomas *v.* Askin, 6 W. N. C., 501.
[4] Langolf *v.* Pfromer, 2 Phila. (Pa.), 17.

delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts, and this by those who have dealt and settled with him.[1] A jury has no right to assume that because most of the items of a physician's account have been proved to be correct that all of the items are correct. The physician must either prove his account by direct or positive proof or show that he keeps correct books, and that his accounts have been correctly transcribed."[2] Book entries made by a physician's clerk from memoranda furnished at the time of their entry have been held admissible.[3] A physician's diary, visiting list, or "call book, with figures and symbols marked down in blank spaces opposite the patients' names, to indicate the amount and character of the services rendered, cannot be received in evidence as a book of original entries."[4] But the visiting list of a physician, if the entries are regularly proved, is admissible to show the number of visits made to a patient.[5] The opinion of a witness that a physician attended the deceased for six or eight months before his death and that the bill was a just and correct one cannot supply the lack of data to support such an opinion.[6] It has been held, however, that a physician may prove the rendition of professional services by a witness who testified that the physician left the office, taking medicine with him, and said that he was going to visit the defendant, and started in the direction of the place where he lived.[7] "The charge for

[1] Swan *v.* Warner, 197 N. Y., 190.

[2] Moore *v.* Joyce, 23 Miss., 584.

[3] Haines' Estate, 26 Co. Ct. (Pa.), 223.

[4] German's Estate, 16 Phila. (Pa.), 318; Kelley's Estate, 18 Co. Ct. (Pa.), 117.

[5] Moffett's Estate, 11 Phila, 79.

[6] Dejol *v.* Johnson, 12 La. Ann., 853.

[7] Autanga Co. *v.* Davis, 32 Ala., 703.

'medicine' in a physician's book of original entries is as distinct and certain and definite as the law demands. Usually such medicine is made up of several drugs in largely different proportions. To say that such a charge would not be one recognized by the courts as a proper one unless it stated all the various drugs prescribed with the different proportions of each drug furnished in the prescription would be a construction of the law which would be absurd. The law relating to entries in a book account in commercial transactions cannot be applied with the same strictness to professional accounts such as this where nearly all medicines are compounded."[1] Under the Nebraska statute the books of account of a physician are admissible in an action against the personal representative of a deceased patient to recover for professional services supported by the suppletory oath of his wife.[2] And in Pennsylvania it was held that professional services rendered by a physician are a proper subject of book account.[3] But in a later supreme court case the court intimated that upon proper objection they would hold them inadmissible.[4] And it has been held that while such books should be produced and proved in the usual way, that testimony proving the actual rendition of such services was better than the production of the books.[5]

(7) *Proof of Value of Services.*—In an action by a physician to recover the value of professional services rendered, the value to be proved by him is the ordinary and reasonable price for services of that nature; but he is not bound to prove the value of the services to

[1] Stagger's Estate, 43 Weekly Notes of Cases, 79.
[2] Martin *v.* Scott, 12 Neb., 42.
[3] German's Estate, 16 Phila., 318.
[4] In re Fulton, 178 Pa., 78.
[5] Durand *v.* Grimes, 18 Ga., 693.

the patient.[1] Medical services rendered upon proper request are presumed to be of some value.[2] Should the case be one of a difficult operation, and the professional ability of the physician or surgeon be of the highest, the jury are bound to take these facts into consideration in arriving at a verdict.[3] So, too, in the case of epidemics, physicians are entitled to charge an increased rate for their services, but the existence of an epidemic does not authorize exorbitant fees.[4] Evidence of a physician's income prior to the rendition of the services is admissible to show the value of his time, but evidence of a falling off of receipts during the time services were rendered is inadmissible, since this might have been due to other causes.[5] There is no presumption of law as to the value of a surgeon's services, nor that a jury can ascertain their value without testimony from persons knowing something about it. Nor has a jury a right to reduce the compensation claimed for such services where indisputed testimony shows it to have been appropriate, and on their own unsupported notions that the treatment should have been different.[6] A witness who is called by the patient to show the value of services sued for cannot testify as to the usual and customary charge for like services, but must confine himself to the value of the particular services in question;[7] neither can the reasonableness of the fee be established by a witness testifying to what the same physician had charged him in a similar case;[8] nor can one not a physician testify as to the

[1] Styles *v.* Tyler, 64 Conn., 432.
[2] Board of Commissioners *v.* Brewington, 74 Ind., 7.
[3] Lange *v.* Kearney, 4 N. Y. Supp., 14; 127 N. Y., 676.
[4] Collins *v.* Graves, 13 La. Ann., 95.
[5] Burke *v.* Mulgrew, 127 App. Div., 733.
[6] Wood *v.* Barker, 49 Mich., 295.
[7] Trenor *v.* C. P. R. R. Co., 50 Cal., 222
[8] Collins *v.* Fowler, 4 Ala., 647.

value of such services;[1] but expert witnesses may testify as to the value of medical services rendered, even though they have no knowledge as to what other physicians have charged for such work, but base their opinion on what they think the services are worth.[2]

Evidence as to the fitness of a cellar as a place for an operation has been held admissible on the question of reasonableness of the charge therefor.[3] Where the witnesses differ as to the proper charges to be made by the physician, it is the duty of the jury to search for the true value of the services performed. In Louisiana the rule is that where the witnesses differ as to the proper charges to be made by physicians the correct rule is to allow the lowest estimate.[4]

(8) *Presentation and Proof of Claims Against Estates of Decedents.*—In those jurisdictions where there are no statutory enactments prescribing the method of presenting claims there are no technical rules which regulate the form for exhibiting claims in the probate court, or for framing issues for their trial on appeal, and it is not desirable that there should be. Substance is more regarded than form in such cases, and the simpler the statement the better, if sufficient to appraise the court and parties of the real claim.[5] But in those jurisdictions where statutory enactment prescribes the method of presenting claims the letter of the enactment must be complied with. This is frequently of great importance, as in cases of insolvency the priority of the claim presented might govern its payment.[6] The claim against a decedent's estate

[1] Mock *v.* Kelly, 3 Ala., 387.
[2] Board of Commissioners of Marion Co. *v.* Chambers, 75 Ind., 409.
[3] Sayles *v.* Fitzgerald, 72 Conn., 391.
[4] Succession of Duclos, 11 La. Ann., 406; Collins *v.* Graves, 13 La. Ann., 95.
[5] Comstock *v.* Smith, 26 Mich., 306. [6] Piffer *v.* Suss, 73 Mo., 245.

must be filed or presented by the person who owns it or has an interest in it, with the right of enforcing its collection, or by his agent or attorney; its presentment by a prior holder is not sufficient.[1] Claims may be presented at any time after the executors qualify and enter upon the discharge of their duties, and while they are entitled to a reasonable time to examine and decide, even though no notice has been published, the effect of their decision is the same as though the claim were presented after publication. The notice is for the protection of executors and the estates which they represent, and there is no absolute legal obligation to give it at all. The majority of the States have enacted laws making the costs and expenses of the last sickness of a person preferred debts; that is, they are entitled to be paid before the ordinary debts of the estate are paid. In the absence of a statute on the subject the costs and expenses of the last sickness have no preference over the ordinary debts of an individual. The duration of the last sickness may be long or short and no definite time can be fixed therefor. The last sickness is the sickness which terminates in death. Many persons die by suicide, accident, result of war, and execution by law who do not have any last sickness, and others, again, may die as the result of the development of a disease with which they have been afflicted for years. It is, however, now well settled that in chronic cases the last sickness dates from the time that the disease takes a turn for the worse, which condition continues until death.[2] As was said by the Appellate Court in a case in which the question of the "last illness" of one who had been lingering for months with a

[1] Marshall *v.* Perkins, 72 Me., 343.

[2] Huse *v.* Brown, 8 Me., 167; Stagger's Estate, 8 Pa. Super. Ct., 260.

cancer was in issue, and in which the trial court had instructed the jury that if they should decide the testator died of the cancer under which he was suffering when the physician attended him and that it was a continuing complaint or disorder until his death, they might consider it his last illness. And why not whether any such instruction had been given to them or not? It would seem to be a plain understanding of an indisputable fact that the sickness which terminated in the death of a patient is his last sickness. . . . Sickness assumes so many forms, and death approaches in so many different ways, that we know not how to lay down any legal principle in such cases that can be applied by way of construction of the word "last sickness." What is to be considered a man's last sickness seems to be a question properly determinable by the jury upon the facts in each case, and which can seldom, if ever, be the same in two instances. There may probably be in a multitude of cases a strong resemblance. On a trial for homicide it is always a question for the jury whether the deceased died a natural death or in consequence of the act of the person accused. So it may be a question whether the sickness of which a person dies is the same under which he labored when confined and receiving medical aid one or two months before. In the case before us the questions as to the cause of the testator's death and the continuance of his sickness have been settled by the jury whose business it was to settle it.[1] A South Carolina court in deciding the question what constitutes the "last sickness" says: "The court can lay down no rule or limitation for the duration of the last sickness of a man nor for the degree of attention to be paid him. A wounded man may linger a long time

[1] Huse *v.* Brown, 8 Me., 167.

in a helpless state, and chronic diseases and some cancers run through more time than a year. The act concurs with the principles of christian civilization, and is remedial of a common want and necessity—attention and services during last sickness. We must therefore construe it liberally and let it inure to its proper end, the full relief of the sick and the infirm. The court and the jury were the proper judges in the particular instance, and they appear to have assessed the amount of the plaintiff's account with justice and discretion."[1] Physicians should be careful in presenting their claims to see to it that they are presented within the prescribed period, for a failure to do so will, in a majority of the States, bar the claim. The time fixed for presentation of claims refers as well to those not due as to those which have already accrued. It seems to be well settled in some States that the mere promise of the executor or administrator is not sufficient to take the case out of the operation of the statute.[2] And in several States executors and administrators are prohibited from allowing claims barred by prescription. The verification of claims is a precaution against gross imposition. It is quite general to require the verification of the account submitted to the executor, and the affiant should be required to show that the particular claim is just and owing, and that there are no counter claims outstanding to the best of his knowledge and belief. Provisions exist in several of the States by which the administrator, being duly convinced of the validity of a claim presented, may allow the claim without the formality of a judgment. In other States the probate court must certify its approbation of the

[1] Percival, Admr., *v.* McVoy, Dudley (S. C.), 337.

[2] Steel *v.* Steele's Admr., 64 Ala., 438; Bingham *v.* Robertson, 25 Miss., 501.

allowance, and in all of the States, before compulsory payment is allowed, a duly docketed judgment must be exhibited as a prerequisite. Where a claim against an estate is presented in proper form and duly verified to the person and at the place named in the statutory notice to creditors given by executors, and after a reasonable opportunity to examine into its validity and fairness, the executors do not offer to refer on the ground that they doubt its justice, or do not dispute it, it acquires the character of a liquidated and undisputed debt against the estate.[1]

(9) *Physician's Disqualification against Deceased Patient.*—In almost every jurisdiction in the United States, statutes have been enacted excluding the testimony of the survivor of a transaction with a decedent when offered against the latter's estate. "The law in this exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes, or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf."[2] It seems to us, however, that statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them, by destroying the evidence to prove such claim, than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. Whatever the correct principle may be a physician's lips are sealed in a claim against estates of decedents, and he can only prove his case

[1] Lambert *v.* Craft, 98 N. Y., 342.
[2] Owens *v.* Owens, 14 W. Va., 88.

by submitting his books of account and by producing other competent witnesses whose testimony may corroborate the account. The persons most commonly called upon to corroborate a physician's account are his wife or his attendant. In some States the wife is denied the right to testify in a suit to which her husband is a party.

CHAPTER VI

MALPRACTICE OR NEGLIGENCE

1. DEFINITIONS

(*a*) **Malpractice.**—Malpractice is the negligent performance by a physician of the duties which are devolved and incumbent upon him on account of his contractural relations with his patient.[1]

(*b*) **"Ethical Malpractice."**—"Ethical malpractice" is that kind of malpractice in which persons claiming to be medical men bring suits against physicians or against medical societies for alleged insults to their professional dignity.[2] This is a branch of the subject which is but little understood outside of the medical profession, and no physician who attends strictly to the business of his profession and does not meddle in the business or notions of those around him needs any special instruction or advice in regard to it.

(*c*) **"Criminal Malpractice."**—"Criminal malpractice" is that branch of malpractice in which the State initiates the proceedings under the provisions of the criminal law.[3]

(*d*) **"Wilful Malpractice."**—"Wilful malpractice" is where the physician purposely administers medicines or performs an operation which he knows and expects will result in damage or death to the individual under his care—as in the case of criminal abortion.[4]

[1] Tucker *v.* Gillette, 12 Ohio C. D., 401; 67 Ohio St., 106; in Hyatt *v.* Adams, 16 Mich., 180, malpractice is defined as the want of proper skill and care in the performance of an operation.

[2] McClelland's definition.

[3] Ibid.

[4] People *v.* Lohman, 2 Barb. (N. Y.), 216.

(*e*) **"Ignorant Malpractice."**—"Ignorant malpractice" is the administration of medicines calculated to do injury which do harm, and which well educated and scientific medical men would know were not proper in the case.[1]

2. DEGREE OF CARE AND SKILL REQUIRED

(*a*) **General Rule.**—The law relating to malpractice is simple and well settled, although not always easy of application. A physician and surgeon by taking charge of a case impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in localities similar to that where he practises, and which are ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practising medicine and surgery.[2] Upon consenting to treat a patient it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment.

The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill which belongs only to a few men of

[1] Elwell, Malpractice, p. 198.

[2] Force *v.* Gregory, 63 Conn., 167; Gramm *v.* Boeuer, 56 Ind., 497; Whitesell *v.* Hill, 101 Iowa, 629; Small *v.* Howard, 128 Mass., 136; Burke *v.* Foster, 114 Ky., 20; 68 S. W., 1096; Dye *v.* Corbin, 59 W. Va., 266.

rare endowments, but such as is possessed by the average member of the medical profession in good standing.[1]

Still he is bound to keep abreast of the times, and a departure from the approved methods in general use if it injures the patient will render him liable however good his intentions may have been.[2] An amputation which would have been justified twenty-five years ago would now be looked upon as clear evidence of ignorance and unskilfulness.

The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and to render a physician liable it is not enough that there has been a less degree of care than some other medical man might have bestowed, but there must be a want of ordinary and reasonable care leading to a bad result.[3] This includes not only the diagnosis[4] and treatment,[5] but also the giving of proper instructions[6] to his patient or his attendants.

[1] Landon *v.* Humphrey, 9 Conn., 209; Tefft *v.* Wilcox, 6 Kan., 46; Howard *v.* Grover, 28 Me., 97; Simonds *v.* Henry, 39 Me., 155; Pike *v.* Honsinger, 155 N. Y., 201.

[2] *Iowa*—Dunbauld *v.* Thompson, 109 Ia., 199. *Kansas*—Tefft *v.* Wilcox, 6 Kan., 46. *Maine*—Patten *v.* Wiggin, 51 Me., 594. *New York*—Carpenter *v.* Blake, 60 Barb., 488. *Ohio*—Gillette *v.* Tucker, 67 Ohio St., 106. *Pennsylvania*—McCandless *v.* McWha, 22 Pa. St., 261. *Rhode Island*—Bigney *v.* Fisher, 26 R. I., 402.

[3] *Alabama*—McDonald *v.* Harris, 131 Ala., 359, 31 So., 548. *Connecticut*—Landon *v.* Humphrey, 9 Conn., 209. *Illinois*—Hallam *v.* Means, 82 Ill., 379. *Iowa*—Peck *v.* Hutchison, 88 Ia., 320; 55 N. W., 511. *Kansas*—Tefft *v.* Wilcox, 6 Kan., 48. *Maine*—Patten *v.* Wiggins, 51 Me., 594. *Maryland*—State *v.* Housekeeper, 70 Md., 162; 16 Atl., 382. *Michigan*—Hesse *v.* Knippel, 1 Mich., N. P., 109. *New York*—Bellinger *v.* Craigue, 31 Bart., 534. *Pennsylvania*—McCandless *v.* McWha, 22 Pa., 261.

[4] *Colorado*—Jackson *v.* Burnham, 20 Colo., 532; 39 Pac., 577. *Illinois*—Quinn *v.* Donovan, 85 Ill., 194. *Maine*—Patten *v.* Wiggin, 51 Me., 594. *Missouri*—Grainger *v.* Still, 187 Mo., 197; 85 S. W., 1114. *New York*—Graves *v.* Santway, 52 Hun., 613; 127 N. Y., 677.

[5] Quinn *v.* Donovan, 85 Ill., 194; Pike *v.* Honsinger, 155 N. Y., 201.

[6] Beck *v.* Klinik, 78 Iowa, 696; Feeney *v.* Spaulding, 89 Me., 111; Vanhooser *v.* Berghoff, 90 Mo., 487; Carpenter *v.* Blake, 75 N. Y., 12; Pike *v.* Honsinger, 155 N. Y., 203.

The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment, provided he does what he thinks best after careful examination.[1] His implied engagement with his patient does not guarantee a good result,[2] and no presumption of the absence of proper skill and attention arises from the mere fact that the patient does not recover. Judge Taft (later President of the United States) in one of his decisions said: "A physician is not a warrantor of cure."[3] But a surgeon may contract to effect a cure.[4] And he promises by implication to use the skill and learning of the average physician

[1] Fisher *v.* Nicolls, 2 Ill. App., 484; Pike *v.* Honsinger, 155 N. Y., 201; Heath *v.* Glisan, 3 Or., 64.

[2] *United States*—Ewing *v.* Goode, 78 Fed., 442. *Colorado*—Jackson *v.* Burnham, 20 Colo., 532. *Connecticut*—Styles *v.* Tyler, 64 Conn., 432; 30 Atl., 165. *Illinois*—McKee *v.* Allen, 94 Ill. App., 147. *Indiana*—Quinn *v.* Donovan, 85 Ind., 194. *Maine*—Patten *v.* Wiggin, 51 Me., 594. *Minnesota* — Martin *v.* Courtney, 75 Minn., 255. *Missouri*—Vanhooser *v.* Berghoff, 90 Mo., 487; Logan *v.* Field, 75 Mo. App., 594. *Ohio*—Gallagher *v.* Thompson, Wright, 466. *Pennsylvania*—Fiedeman *v.* Loewengrund, 2 Weekly Notes of Cases, 272. *Texas*—Graham *v.* Gautier, 21 Tex., 111. *West Virginia*—Lawson *v.* Conaway, 37 W. Va., 159; Dye *v.* Corbin, 59 W. Va., 266.

[3] Ewing *v.* Goode, 78 Fed., 442.

[4] Vanhooser *v.* Berghoff, 90 Mo., 487.

Average Skill of Profession is Required. Alabama — McDonald *v.* Harris, 131 Ala., 359. *Connecticut*—Styles *v.* Tyler, 64 Conn., 432. *Georgia*—Smith *v.* Overby, 30 Ga., 241. *Illinois*—Quinn *v.* Donovan, 85 Ill., 194. *Indiana*—Jones *v.* Angell, 95 Ind., 376. *Iowa*—Whitesell *v.* Hill, 101 Ia., 629. *Kansas*—Tefft *v.* Wilcox, 6 Kan., 46. *Kentucky* —Hickerson *v.* Neeley (Ky.), 54 S. W., 842. *Maine*—Patten *v.* Wiggin, 51 Me., 594. *Maryland*—State *v.* Housekeeper, 70 Md., 162. *Massachusetts*—Harriott *v.* Plimpton, 166 Mass., 585. *Michigan*—Hitchcock *v.* Burgett, 38 Mich., 501. *Minnesota*—Martin *v.* Courtney, 75 Minn., 255. *Missouri*—Vanhooser *v.* Berghoff, 90 Mo., 487. *Nebraska*—Van Skike *v.* Potter, 53 Nebr., 28. *New Hampshire*—Leighton *v.* Sargent, 27 N. H., 460. *New Jersey*—Ely *v.* Wilbur, 49 N. J. L., 685. *New York*—Pike *v.* Honsinger, 155 N. Y., 201. *North Carolina*—Boon *v.* Murphy, 108 N. C., 187. *Ohio*—Gillette *v.* Tucker, 67 Ohio St., 106. *Oregon*—Heath *v.* Gilsan, 3 Or., 64. *Pennsylvania*—McCandless *v.* McWha, 22 Pa., 261. *Tennessee*—Wood *v.* Clapp, 4 Sneed (Tenn.), 65. *Texas*—Graham *v.* Gautier, 21 Tex., 111. *Vermont*—Wilkins *v.* Brock, 81 Vt., 332. *Washington*—Wells *v.* Lumber Co., 107 Pac., 869. *Wisconsin*—Nelson *v.* Harrington, 72 Wis., 591.

to exercise reasonable care and to exert his best judgment in the effort to bring about a good result.

An undertaking merely to attend and to cure and heal a broken leg does not impose upon the physician any more liability than is imposed by law.[1]

(*b*) **Physician as an Insurer.**—In the absence of a special contract to that effect a physician does not warrant or insure that his treatment will be successful or even beneficial.[2] That medical treatment is unsuccessful will not of itself justify an inference of unskilfulness or negligence by the physician in an action against him for malpractice.[3] The mere failure to effect a cure does not even raise a presumption of a want of proper care, skill, and diligence in a physician.[4]

The implied contract of a physician or surgeon is not to cure or to restore a fractured limb to its natural perfectness, but to treat the case with diligence and skill. The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and length, or the patient may by wilful disregard of the surgeon's directions impair the effect of the best conceived measures.[5]

As was said by Judge Woodward in a supreme court decision in Pennsylvania: "He deals not with

[1] Hoopingarner *v.* Levy, 77 Ind., 455.

[2] *United States*—Ewing *v.* Goode, 78 Fed. Rep., 442. *Colorado*—Jackson *v.* Burnham, 20 Colo., 532. *Illinois*—Quinn *v.* Donovan, 85 Ill., 194. *Indiana*—Jones *v.* Angell, 95 Ind., 376. *Kansas*—Tefft *v.* Wilcox, 6 Kan., 46. *Kentucky*—Hickerson *v.* Neely (Ky., 1900), 54 S. W., 842. *Maine*—Patten *v.* Wiggin, 51 Me., 594. *Michigan*—Hesse *v.* Knippel, 1 Mich., N. P., 109. *Minnesota*—Martin *v.* Courtney, 75 Minn., 225. *Missouri*—Gere *v.* Brockman, 138 Mo. App., 231. *New York*—Pike *v.* Honsinger, 155 N. Y., 206. *Ohio*—Gallaher *v.* Thompson Wright, 466. *Oregon*—Williams *v.* Poppleton, 3 Or., 139. *West Virginia*—Lawson *v.* Conaway, 37 W. Va., 159.

[3] Hamrick *v.* Shipp (Ala.), 52 So., 932.

[4] Lawson *v.* Conaway, 37 W. Va., 159; 16 S. E., 564.

[5] Fish *v.* Welker, 5 Ohio Dec., 752; Williams *v.* Poppleton, 3 Or., 139; McCandless *v.* McWha, 22 Pa., 261; Bigney *v.* Fisher, 26 R. I., 402; 59 Atl., 72.

insensate matter like the stonemason or the bricklayer, who can choose their materials and adjust them along mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and a will to regulate and control."[1]

"The white headstones and monuments that glisten in the sunshine within the sacred precincts devoted to the repose of the dead in the suburbs of every city in the land testify with unerring certainty that man is mortal, and the most effective efforts of the healing art are incapable of resisting the conqueror of all."[2]

It has been held that a surgeon was not responsible for a want of success where he attended a patient suffering from hip disease, and called another physician of experience in consultation, and they arrived at the conclusion that the thigh was dislocated, and set the same, and placed it in a plaster cast, and visited the patient continuously until he moved away from the city, using every precaution, but the treatment was not successful.[3]

In an action for malpractice against physicians and surgeons to recover for an alleged unskilful and negligent operation upon the plaintiff's eye, which resulted in injury and disease, the plaintiff offered to prove that an operation was performed on her left eye by Dr. W—— on a certain date; that prior to the operation her eye was strong and in good condition, except as to the affection of strabismus. The operation was successful so far as straightening her eye was concerned, but she stated that afterward neither the eye operated on nor the right eye was as strong as before. She stated that sometime after the operation she had what she called "a spell of sore

[1] McCandless *v.* McWha, 22 Pa. St., 261.
[2] Martin *v.* Courtney, 87 Minn., 200.
[3] Champion *v.* Keith, 17 Okla., 204.

eyes." The lids were afterward inflamed and her eye watered when she was out in the wind or cold. When she returned to school she found her eyes were weak and that it was necessary to bring objects closer to her in order to see clearly. It further appeared that her father, brother, and sister were afflicted with sore eyes. Was the proof sufficient to sustain a cause of action? The court says: "We agree with the district court [the lower court] that it did not show the operation to have been unskilfully and negligently performed, nor yet that the present condition of her eyes was the result of the operation that was performed. No proof was offered of the instruments used or the manner in which the operation was performed. No medical or scientific evidence was offered showing the cause of the present condition of the plaintiff's eyes, nor that the defendants were negligent or careless in the performance of the operation . . . and negligence cannot be presumed. The mere fact that the plaintiff's eyes have been weak and sore since the operation was performed does not prove negligence in the defendants nor establish a liability against them. To maintain her action the plaintiff should have offered the evidence of skilled witnesses to show that the present condition of her eyes was the result of the operation and that it was unskilful and negligently performed."[1]

The failure of a physician to effect a cure of a dislocated clavicle does not of itself show a want of care or skill in its treatment, where it appears that results are not always satisfactory under any form of treatment, and there is no assurance that the bone will permanently remain in place.[2]

[1] Pettingrew *v.* Lewis, 46 Kan., 78.
[2] Tomer *v.* Aiken, 126 Iowa, 114; 101 N. W., 769

Unskilful treatment is not established from the mere fact that a leg which has been set is shorter than the other.[1] But a physician is not absolved from liability for failure to exercise proper skill in a particular case by the fact that the result is as good as is usually obtained in like cases.[2]

(*c*) **Errors of Judgment.**—Freedom from errors of judgment is never contracted for by the physician. Ordinary good judgment is necessarily implied in the possession of ordinary skill, and if such share of judgment is fairly exercised any risk from mere errors and mistakes is upon the employer alone. The patient, too, has judgment to exercise in the selection of the physician whom he will employ; and if he makes a bad selection, if he fails to choose a man of the best judgment, the result is fairly to be attributed to his own mistake, and is not to be visited upon the man who has honestly done his best endeavor in his service. It is in accordance with these views that it has often been held that a physician is not responsible for errors of judgment, for mere mistakes, in cases of reasonable doubt and uncertainty.[3] A physician's error of judgment in the treatment of a case does not amount to malpractice, unless so gross as to be inconsistent with due care; nor can malpractice be inferred from the mere result of the treatment.[4]

A medical man, for instance, is not bound to form a right judgment as to sanity so as to be liable in an action if he does not. And yet in one case the court

[1] Piles *v.* Hughes, 10 Iowa, 579.

[2] Burke *v.* Foster, 114 Ky., 20; 69 S. W., 1096.

[3] Jackson *v.* Burnham, 20 Colo., 532; Fisher *v.* Niccolls, 2 Ill. App., 484; Vanhooser *v.* Berghoff, 90 Mo., 487; 3 S. W., 72; MacKenzie *v.* Carman, 103 App. Div. (N. Y.), 246; Leighton *v.* Sargeant, 7 Foster (N. H.), 460; Heath *v.* Glisan, 3 Or., 64; Graham *v.* Gautier, 21 Tex., 111; Dye *v.* Corbin, 59 W. Va., 266; 53 S. E., 147.

[4] Wilkins' Admr. *v.* Brock and Rosselle, 81 Vt., 332.

seemed to hold that because the surgeon erred in judgment in not cutting off a limb nearer the body he was liable; the result being that judgment was rendered against him not because he failed to remove the whole limb, but because he failed, as it was thought, to remove it a few inches higher up.[1] When a skilful and careful surgeon exercises his best judgment in a case of doubt he cannot be held liable for want of success.[2]

The rule that error of judgment is not malpractice has no application in case of a person who knows nothing of anatomy, surgery, or physics, since he can have no judgment in the matter.[3] Also, the error of judgment may be so gross as to be inconsistent with that degree of care and skill that it is the duty of every surgeon to possess.[4] But want of requisite qualifications is not shown by proving that a physician was discharged by a patient and another physician hired who changed the treatment.[5] The justification for this rule lies in the nature of the undertaking and the subject matter with which medical men deal.

On the human subject matter with which physicians have to do the remarks of Judge Upton, quoting partly from a supreme court decision in Pennsylvania, cannot be improved upon: "The surgeon does not deal with inanimate or insensate matter like the stonemason or the bricklayer, who can choose his materials and adjust them according to mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and an excited will to regulate and control. Where a surgeon undertakes to treat a fractured limb he has not only to apply the known

[1] Howard *v.* Grover, 28 Me., 97.
[2] Williams *v.* Poppleton, 3 Or., 139.
[3] Jackson *v.* Burnham, 20 Colo., 532.
[4] West *v.* Martin, 31 Mo., 375.
[5] Farrell *v.* Haze, 157 Mich., 374.

facts and theoretical knowledge of his science, but he may have to contend with very many hidden and powerful influences, such as want of vital force, habit of life, hereditary disease, the state of the climate. These or the mental state of his patient may often render the management of a surgical case difficult, doubtful, and dangerous; and may have greater influence in the case than all the surgeons may be able to accomplish even with the best of skill and care."[1]

Another practical reason for the exception to the ordinary rule in negligence cases is the inherent and inevitable uncertainty of available testimony. The basis of the proof of negligence and of the hypothetical questions to plaintiff's experts is naturally the narrative of family and friends of the patient. Their testimony must ordinarily be unsatisfactory because of the presence of natural bias, the absence of technical knowledge essential to proper observation, and often the want of opportunity for actual perception. "The physician," said Judge Upton, "is liable to have his acts misjudged, his motives suspected, and the truth colored or distorted, even where there are no dishonest intentions on the part of his accusers. And from the very nature of his duty, he is constantly liable to be called upon to perform the most critical operations in the presence of persons united in interest and sympathy by the ties of family, where he may be the only witness in his own behalf."[2]

(*d*) **Necessity of Following Established Modes of Practice.**—The law very wisely requires that some standard by which to determine the propriety of treatment must be adopted; otherwise experiment would take the place of skill, and the reckless experi-

[1] Williams *v.* Poppleton, 3 Or., 139.
[2] Ibid.

mentalist the place of the educated experienced practitioner.[1]

Before it can be said that there is any established mode of treatment, it must appear that according to the general consensus of opinion of medical men, that it is so considered, and is followed by the ordinary practitioner. Physicians are bound by what is universally settled in the profession and not by the mere fact that some writers on the treatment of a certain ailment or that practical surgeons prescribe a certain mode of treatment.[2]

A reckless disregard of a new discovery, and an adhesion to a once approved but exploded or abandoned practice resulting in injury to a patient, will give a cause of action. But, on the other hand, no medical man can be bound to resort to any practice or remedy that has not had the test of experience to recommend it, and a physician or surgeon resorting to such new practice or remedy with injurious consequences following, would be more liable to an action than one who with like result followed the beaten track. Without experiment there would be no progress in medical or any other science. Still he who tries the experiment and thereby injures another must take the consequences. It is sufficient if the practitioner follow a known and recognized system.[3] It matters not then how much skill a physician or surgeon may have if he does not follow the established mode of practice in the particular case. This fact may be taken by the jury as evidence of the want of such skill.[4]

[1] Tefft *v.* Wilcox, 6 Kan., 46; Hesse *v.* Knippel, 1 Brown (Mich.), 109.

[2] Burnham *v.* Jackson, 1 Colo. App., 237; 28 Pac., 250.

[3] Williams *v.* Poppleton, 3 Or., 139.

[4] Jackson *v.* Burnham, 20 Colo., 532; Patten *v.* Wiggin, 51 Me., 599; Carpenter *v.* Blake, 60 Barb. (N. Y.), 488.

But to show the want of skill, it is never sufficient to prove that the physician has not treated in that mode nor used those measures which in the opinion of other medical men the case required.[1] In the Colorado case just cited the plaintiff had phimosis, and the physician in attendance applied a flaxseed-meal poultice, which aggravated the disease and accelerated gangrene, and resulted in the loss of the organ.

Directing a person with a broken arm to bathe it with wormwood and vinegar, although condemned by experts, is not such a departure from established practice as will justify a recovery against the surgeon, there being nothing to show that it would cause injury.[2]

(*e*) **As Measured by the Practice of the Particular School.**—The general rule of law is that a physician or surgeon, or one who holds himself out as such, whether duly licensed or not, when he accepts an employment to treat a patient professionally, must exercise such reasonable care and skill in that behalf as is usually possessed and exercised by physicians or surgeons in good standing of the same school or system of practice.[3] All the physician undertakes is that he will faithfully treat the case according to the recognized rules of his particular school.[4] Thus a homeopathic physician who gives to a case the treatment prescribed by his school of practice is entitled to have the rules of his school applied in determining whether or not he was guilty of malpractice.[5]

[1] Carter *v.* Fernald, McClelland's Civil Malpractice, 19.

[2] Winner *v.* Lathrop, 67 Hun. (N. Y.), 511.

[3] Force *v.* Gregory, 63 Conn., 167; 27 Atl., 1116; Bowman *v.* Woods, 1 Greene (Ia.), 441; Patten *v.* Wiggins, 51 Me., 594; Martin *v.* Courtney, 75 Minn., 255; Nelson *v.* Harrington, 72 Wis., 591; 40 N. W., 228.

[4] Patten *v.* Wiggins, 51 Me., 594.

[5] Force *v.* Gregory, 63 Conn., 167; 27 Atl., 1116; Martin *v.* Courtney, 75 Minn., 255.

In an action against osteopaths for malpractice the defendant's treatment must be tested exclusively by the principles and practice of the school of osteopathy.[1]

A physician of another school is incompetent to express an opinion as to the correctness of the treatment given by an osteopath in case of disease of the hip, unless it appears that both schools employ the same treatment in such cases. But a physician of one school may testify as to the correctness of the diagnosis of a case which one of another school treated as dislocation of the hip-joint, where the diagnosis of dislocation and of disease of the joint is the same in all schools of medicine, as the bias or prejudice of one school of medicine against another cannot affect the question of diagnosis, however much it might affect the treatment employed by the other school.[2]

Christian Scientists.—A Christian Scientist is bound to exercise the care, skill, and knowledge not of the ordinary physician, but of the ordinary person who undertakes to treat diseases according to the methods of such healers.[3] For as is said in Story on *Bailments*, Sec. 435: "If a person will knowingly employ a common matmaker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly. So if a man who has a disorder of his eye should employ a farrier to cure the disease, and he should lose his sight by using the remedy prescribed in such cases for horses, he would certainly have no legal ground for complaint;" and in cases involving the liability of medical practitioners, courts have

[1] Wilkins' Admr. *v.* Brock and Rosselle, 81 Vt., 332.
[2] Grainger *v.* Still, 187 Mo., 197.
[3] Spead *v.* Tomlinson, 73 N. H., 46; 59 Atl., 376.

held that: "If there are distinct and differing schools of practice, as allopathic or old school, homeopathic, Thompsonian, hydropathic or water cure, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools."[1] So where an adult person suffering from an attack of appendicitis applies to a Christian Scientist, who held himself out as competent to treat diseases, for treatment, she knew that she would not receive the same kind of treatment as that given by physicians of the regular school and cannot afterward complain that the method was improper.[2]

X-ray Operator.—The so-called *x*-rays discovered by Röntgen have been recognized and known to scientists, both in and out of the medical profession, since 1895. During this time the apparatus for the generation of the *x*-rays, together with the fluoroscope, has been used very generally by electricians, professors of physics, skiagraphers, physicians, and others for experimental and demonstrative purposes. It is a scientific and mechanical appliance the operation of which is the same in the hands of the college professor or the physician of the allopathic, homeopathic, or any other school of medicine. Hence a physician who applies the *x*-rays not for medical purposes, but to locate the gold crown of a tooth supposed to have been inhaled into the lungs of his patient, is not entitled to have the question of his care and skill in applying the *x*-rays determined by the opinions of physicians of his own school.[3]

[1] Carpenter *v.* Blake, 60 Barb. (N. Y.), 488; Bowman *v.* Woods, 1 G. Gr. (Ia.), 441.

[2] Spead *v.* Tomlinson, 73 N. H., 46.

[3] Henslin *v.* Wheaton, 91 Minn., 219, 97 N. W., 882.

Botanic Physician.—A person professing to follow the botanic system of practising cannot be expected by his employer to practise any other. While the regular physician is expected to follow the rules of the old school in the art of curing, the botanic physician must be equally expected to adhere to his adopted method. Thus in an action against a botanic physician, who had attended the plaintiff at childbirth and had not removed the placenta for thirty-six hours after the accouchement, the physician was entitled to set up the defence that according to the botanic system of practice in medicine it was improper to remove the placenta, and that it should be permitted to remain until expelled by efforts of nature.[1]

Clairvoyant.—A clairvoyant physician is liable for failure to exercise the ordinary skill and knowledge of a physician in good standing, practising in the vicinity, and not merely the ordinary skill and knowledge of clairvoyants. If he holds himself out as a medical expert and accepts employment as a healer of diseases, but relies for diagnosis and remedies upon some occult influence exerted upon him, or some mental intuition received by him when in an abnormal condition, he takes the risk of the quality or accuracy of such influence or intuition.[2]

(*f*) **As Dependent upon the Locality of Practice.**—In determining what constitutes reasonable and ordinary care, skill, and diligence, the test is that which physicians and surgeons in the same general line of practice ordinarily have and exercise in like manner,[3] or that which is ordinarily possessed by those practising in similar localities, not necessarily being limited

[1] Bowman *v.* Woods, 1 Greene (Iowa), 441.
[2] Nelson *v.* Harrington, 72 Wis., 591, 40 N. W., 228.
[3] Force *v.* Gregory, 63 Conn., 167.

to that which is in fact exercised in his particular locality.[1]

As was said in an Indiana case: "It seems to us that surgeons and physicians practising in small towns or rural or sparsely populated districts, are bound to possess and exercise at least the average degree of skill possessed by and exercised by the profession in such localities generally. It will not do, as we think, to say that if a surgeon or physician has exercised such a degree of care and skill as is ordinarily exercised in the particular locality where he practises it will be sufficient. There might be but few practising in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say that because one possessed and exercised as much skill as the others he could not be chargeable with want of reasonable skill."[2]

There are authorities, however, which tend to support the rule that a physician and surgeon are bound to exercise only such a degree of care as is ordinarily exercised in their profession in the particular locality in which they practise.[3]

(*g*) **As Affected by the Advanced State of the Profession.**—A physician or surgeon is under obligation to possess, and it is his duty to employ in the treatment of a case, such reasonable skill and diligence as is ordinarily possessed and exercised by members of his profession; and in judging of this degree of

[1] Gramm *v.* Boener, 56 Ind., 497; Whitesell *v.* Hill, 101 Iowa, 629; 70 N. W., 750; Ferrell *v.* Ellis, 128 Iowa, 614; 105 N. W., 993; Burke *v.* Foster, 114 Ky., 20; 68 S. W., 1096; Small *v.* Howard, 128 Mass., 136; McCracken *v.* Smathers, 122 N. C., 799; 29 S. E., 354; Bigney *v.* Fisher, 26 R. I., 402; 59 Atl., 72; Dye *v.* Corbin, 59 W. Va., 266.

[2] Gramm *v.* Boener, 56 Ind., 497.

[3] Pike *v.* Honsinger, 155 N. Y., 201; Hathhorn *v.* Richmond, 48 Vt., 557; Nelson *v.* Harrington, 72 Wis., 591.

skill, regard is to be had to the advanced state of the profession at the time.[1]

Practice which might have sanctioned operations performed two hundred years ago would put a physician or surgeon today in a sorry plight; he must keep up with the times and practise in accordance with the most advanced and improved teachings of his profession.

Thus we have an account of "a bone setter, named Richard, famous in the neighborhood of Napoleon Vendee, but still more famous by reason of having been fined five francs, which made him a martyr, and increased his practice fivefold (who) was consulted on June 4, 1853, by a farmer of the commune of St. Dennis, who complained, after a heavy fall, of a violent pain in the neck. The bonesetter telling him he would put his neck right, seized his head in both hands, and by a rapid motion from left to right, turned the head over the shoulder three times. At the third time a crack was heard, and the bone setter exultantly exclaimed: 'It is done; the neck is reduced.' But at this very instant the patient was seized with paralysis of the arms and legs; his speech became very difficult; he complained of violent pain, and died the next day, firmly convinced of the skill of the operator, asserting to the last that his neck was properly set. Examination of the body showed an effusion of blood at the level of the second and third vertebræ, the ligaments between which were stretched and torn; there was another effusion between the cerebellum and the base of the skull, evidently arising from lesion of the cord and its membranes."[2]

[1] Smothers *v.* Hanks, 34 Iowa, 286; Small *v.* Howard, 128 Mass., 131; McCandless *v.* McWha, 22 Pa., 261; Nelson *v.* Harrington, 72 Wis., 591.

[2] 2 Wh. and St. (part 2), Sec. 811.

An amputation which would have been justified forty years ago would now constitute clear evidence of unskilfulness.

(*h*) **As Affected by Nature of Ailment.**—The state of health of a patient may have much to do in determining whether or not ordinary diligence and care have been used by the attending physician to affect a cure. What might be ordinary care in some circumstances would be gross negligence in others. Thus a disease, such as iritis, known to be rapid and dangerous will require more instant and careful attention than that required in rheumatism, where little, perhaps nothing, can be done hastily.

But the condition the patient is in when the physician is called does not control the right of action, it affects the question of damages only. The right of action depends upon the continuing or intervening conditions that are due to a neglect of duty on the part of the physician, after the patient is in a condition that may result in permanent loss of life or limb, and the physician has been called upon and has undertaken to exercise his skill in arresting the progress of the disease in caring for the wounds or setting the broken bones.[1]

(*i*) **As Affected by Habits and Tendencies.**—A surgeon has not only to contend with the manipulation of a fractured limb, and a physician with administering of the proper remedy, but both have to contend with very many powerful and hidden influences, such as the habits, hereditary tendencies, vital force, mental state, and local circumstances of the patient. These may often render the management of the case difficult, doubtful, and dangerous; and may explain

[1] Mullin *v.* Flanders, 73 Vt., 95; 50 Atl., 813.

his ill success and moderate the degree of his responsibility.[1]

"Many laws of nature applicable to the administration of remedies for the diseases of the human body are not fully understood; many are unknown. In obedience to an occult law an approved remedy may fail. Symptomatic indications often refuse to inform the physician or surgeon of the real disease which his skill is called upon to combat, and an autopsy reveals, too late, conditions of the organs of the patient, that could have been discovered in no other way, which demanded a different course of treatment. As it is impossible for the physician or surgeon, possessing even the highest degree of skill, always to act rightly and truly as he ought, the practitioner should not be held liable if, in the faithful and honest exercise of ordinary skill, which is only demanded, he fails to use the right remedy."[2]

As was said in a late Minnesota case: "Physicians and surgeons deal with progressive inductive science. On two historic occasions the greatest surgeons in our country met in conference to decide whether or not they should operate upon the person of the President of the United States. Their conclusion was the final human judgment. They were not responsible in law, either human or divine, for the ultimate decree of nature. The same tragedy is enacted in a less conspicuous way every day in every part of the country. The same principles of justice apply."[3]

On the other hand it would seem that a surgeon is bound to inform himself of these facts, so far at least as they would be likely to influence, in the manage-

[1] Staloch *v.* Hohn, 100 Minn., 276; Williams *v.* Poppleton, 3 Or., 139.
[2] Almond *v.* Nugent, 34 Ia., 300.
[3] Staloch *v.* Hohn, 100 Minn., 276.

ment of the case, by a prudent physician. As, for example, a physician about to administer an anesthetic is bound to inform himself as to the condition of the plaintiff's lungs, heart, or other organs, which, if unsound, would warn a prudent physician against the administration of that beneficent agency.[1] But a physician using chloroform as an anesthetic is not answerable for negligence because of results arising from the peculiar condition or temperament of the patient, of which he had no knowledge.[2]

(*j*) **Where Services are Gratuitous.**—The fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill, and diligence.[3]

A surgeon or physician, therefore, who is the regular surgeon or physician of a hospital owes precisely the same duty with reference to the care he shall use to a charity patient as he does to a patient who pays him for his services and is liable for neglect accordingly. As was said by the Court of Appeals of New York State: "Whether a patient be a pauper or a millionaire, whether he be treated gratuitously or for a reward, the physician owes him precisely the same measure of duty and the same degree of skill and care. He may decline to respond to the call of a patient unable to compensate him, but if he undertakes the treatment of such a patient he cannot defeat a suit for malpractice or mitigate a recovery against him on the principle that the skill and care required

[1] Jones *v.* Fay, 4 Fost. & F., 525.

[2] Bogle *v.* Winslow, 5 Phila. (Pa.), 136.

[3] *Georgia*—Akridge *v.* Noble, 114 Ga., 949. *Illinois*—McNevins *v.* Lowe, 40 Ill., 209. *Iowa*—Peck *v.* Hutchinson, 88 Ia., 320. *New Hampshire*—Edwards *v.* Lamb, 69 N. H., 599. *New York*—Du Bois *v.* Decker, 130 N. Y., 325. *North Carolina*—Gladwell *v.* Steggall, 5 Bing, 733. *Pennsylvania*—McCandless *v.* McWha, 22 Pa., 261.

of a physician are proportioned to his expectation of pecuniary recompense."[1]

(*k*) **Degree of Care and Skill Required of Specialists.** —The measure of duty of the specialist is measured not by that knowledge and skill possessed and exercised by general practitioners in his locality, but by specialists, for he holds himself out as having greater knowledge and skill in his particular line than has the general practitioner. A specialist is bound to exercise the degree of care and skill which is ordinarily possessed by physicians who devote special attention and study to particular diseases.[2]

Thus a physician who for twelve years specializes his practice to treatment of diseases of the eye, and is placed in charge of the eye, ear, and throat department of a hospital of high standing, and is advertised by its literature as its ophthalmologist, will be held responsible as a specialist for treatment of the eye, and is liable in damages, where a person injured by the fragment of an exploded railroad torpedo striking him under the inner corner of the eye and cutting the lower lid so that it hung down over the cheek, disclosing a wound under the eyeball into the socket, was treated by a physician for a week, who being convinced that there was a foreign substance in the eye, sent the patient to such eye specialist, who made only an external examination, gave the eye attention for a few days, and then sent the patient home, assuring him that there was nothing in the eye, when the original physician operated on the eye and removed a piece of tin nearly an inch long and half an inch wide, which was buried in the tissues.[3]

[1] Du Bois *v.* Decker, 130 N. Y., 325.

[2] Baker *v.* Hancock (Ind.), 63 N. E., 323; Feeney *v.* Spalding (Me.), 35 Atl., 1027; Rann *v.* Twitchell, 82 Vt., 79.

[3] Rann *v.* Twitchell, 82 Vt., 79; 71 Atl., 1045.

One who holds himself out as an expert in the treatment of hernia is required to treat patients with the care and skill commonly shown by physicians and surgeons in his city, and cities in advance or abreast of it, in the practice of medicine and surgery, who devote special study to the treatment of the disease.[1]

(*l*) **In the Use of Anesthetics.**—A physician or surgeon using chloroform as an anesthetic agent is only bound to look to natural and probable effects. He is not answerable for negligence on results arising from the peculiar condition or temperament of the patient of which he had no knowledge.[2] But they must use the highest professional care and skill to avoid every possible danger where they put a patient under the influence of an anesthetic and deprive him of the use of his faculties.[3] As an illustration of an alleged malpractice case for the death of a boy from the effects of chloroform administered in an operation to prevent blood poison we cite the following case: "According to the testimony of Dr. W——, he found the patient suffering from blood poisoning, which was in danger of becoming general. His temperature was more than 100°, and he knew positively that blood poisoning was going to get into his system. He thereupon resolved to operate upon the boy that day, to try and save him from this general blood poisoning. He then questioned the patient as to whether he had had any breakfast, and he responded that he had had a piece of meat and some bread. He used chloroform as an anesthetic instead of some other agent, because he believed it was safe, and

[1] McClarin *v.* Grenzfelder (Mo.), 126 S. W., 817.
[2] Bogle *v.* Winslow, 5 Phila., 136.
[3] Keily *v.* Colton, 1 N. Y. City Ct., 439.

better for the child, who presented such a bad appearance that the doctor did not intrust anybody else to administer the chloroform, but gave it himself. Unfortunately the chloroform proved fatal, because of a condition of the patient's system, described a status lymphaticus, not discoverable by any physical examination that could have been made before death."

The court then goes on to say: "I have been unable to find enough in the proof offered by the plaintiff to justify a finding that there was any lack of professional intelligence, skill, or care on the part of the defendant, either in deciding to perform the operation, or in its performance, including the administration of chloroform. The plaintiff sought to establish such negligence by the testimony of his medical expert, but neither in answer to hypothetical questions nor in any other part of his testimony does he really express the opinion that what is shown to have been done by the defendant was contrary to the best or established practice of qualified surgeons in the treatment of such a case under similar circumstances. He did testify, it is true, that the administration of chloroform is recognized as always being accompanied by danger to a patient's life, and that it is the practice of the medical profession never to give chloroform to a patient after he has partaken of heavy food, except in emergency, the customary practice being to keep the patient twenty-four hours without food before chloroform is given to him. It is to be noted, however, that the test here applicable to Dr. W——'s conduct is not what the patient had actually done in the way of taking food, but what the patient told Dr. W—— on that subject; and the boy's statement to the doctor that he had breakfasted on a piece of meat and some bread was not indicative of the fact

that he had taken a heavy meal. The case, instead of being one of negligence, appears to be only another melancholy instance of death upon the operating table in a charity hospital of a patient being treated with a high degree of skill and care by a surgeon of unquestioned learning. Such a death is always painful enough to the conscientious surgeon under whose care it occurs, but it cannot subject him to any legal liability where, as in this case, there is not sufficient proof that he was derelict in the performance of his professional duty toward his patient."[1]

(*m*) **In Making Examinations.**—Where a physician was employed to determine whether or not a young man was afflicted with a venereal disease, and mistakingly reported that he was, and the result of the report was the breaking of an engagement to marry, the physician was held liable in damages, the court holding that the physician's duty of exercising ordinary diligence, care, and skill in a professional undertaking extended to a case where only information was sought; and that the breaking of an engagement was not too remote to sustain the action.[2]

3. LIABILITY FOR REFUSAL TO TAKE CASE

A wrong impression as to the duty of a physician to attend every sick person who demands his services seems to have taken root in the minds of a great many misinformed persons. It is undoubtedly the law, that a physician is not liable at common law for refusing to attend a sick person who demands his services, and in at least one State it has been held that he is under no obligation to respond to a call by

[1] Wood *v.* Wyeth, 106 App. Div. (N. Y.), 21.
[2] Harriott *v.* Plimpton, 166 Mass., 588; 44 N. E., 992.

reason of the fact that he holds a State license to practise medicine, and although he is a family physician and no other physician is procurable, and he is not liable for the death of a person caused by such refusal to render medical assistance.[1]

4. LIABILITY FOR FAILURE TO MAKE PROPER DIAGNOSIS

A physician or surgeon employed to treat an injury or disease impliedly contracts that he will use his best judgment in the application of his skill in deciding upon the nature of the disease or injury and the best mode of treatment.[2] And a surgeon is guilty of malpractice in treating as a mere bruise a fracture of the neck of the femur, where, when the patient is placed on his back, his foot lies over on one side, without power on his part to control it.[3]

So one who suffers injury through the failure of his physician to discover and reduce a dislocation which could have been readily discovered is entitled to recover damages resulting from the physician's negligence.[4] But a general practitioner will not be held liable for making a wrong diagnosis of a very rare disease which can only be detected by an expert.

Thus a general practitioner cannot be held liable in damages to a patient for diagnosticating and treating a disease of the eye as conjunctivitis when it was in fact glaucoma, where the evidence shows that glaucoma is a very rare disease; that it is incurable in character; that its certain diagnosis could be made only by the skilled expert, of special training, skill,

[1] Hurley *v.* Eddingfield, 156 Ind., 416.
[2] Bonnett *v.* Foote, 47 Colo., 282.
[3] Ibid.
[4] Burton *v.* Neill, 140 Iowa, 141.

and experience; that it should be treated with remedies and appliances which are never expected to be within the reach of the general practitioner; that its prominent symptoms were nearly identical and that the treatment given was not faulty.[1]

A physician is not required to be infallible in diagnosticating diseases, so that the fact that a patient's disease was different than it was diagnosticated to be is merely evidence of negligence. Thus a physician who treats a boy for acute articular rheumatism when the boy's trouble was periosteitis or osteomyelitis is not liable in an action for malpractice if he was possessed of reasonable skill and was reasonably diligent, not negligent, in diagnosticating and treating the case.[2] And a surgeon is not negligent in failing to take an *x*-ray photograph of an injured arm to ascertain whether or not there is a fracture, where he diagnosticates and treats the injury as a sprain, which proves to be erroneous, and results in permanent impairment of the usefulness of the arm.[3]

The breaking of a marriage engagement in consequence of a wrong diagnosis is not too remote a damage to sustain an action for malpractice.[4]

A physician who improperly treats incipient hip disease as a partial dislocation of the joint, by reason of which the patient is subjected to great sickness and suffering, and crippled for life, cannot escape liability on the ground that the same result would have ensued from the disease alone if he had not interfered.[5]

An attending physician and surgeon is not confined

[1] Wohlert *v.* Leibert, 23 Pa. Super. Ct., 213.
[2] Hamrick *v.* Shipp (Ala.), 52 So., 932.
[3] Wells *v.* Ferry-Baker Lumber Co., 57 Wash., 658; 107 Pac., 869.
[4] Harriott *v.* Plimptons, 166 Mass., 585.
[5] Grainger *v.* Still, 85 S. W., 1114.

to any special test in his examination of his patient to discover whether or not the latter's shoulder-joint had been injured by a fall, but in regard to the examination and treatment, he is required to exercise that reasonable skill and care which a prudent member of his profession should use under the circumstances.[1] Whether a physician, in making a diagnosis, used ordinary care and skill is a question of fact for the jury.[2]

5. LIABILITY FOR MISTAKE IN PRESCRIPTION

A physician who negligently or ignorantly writes a prescription is liable in damages for the injury resulting therefrom. Thus where a prescription, by *lapsus clami*, had *pulv.* instead of *camph.* following *opii*, as result of which the infant taking it dies, the fact that the druggist who fills the prescription may have been negligent will not excuse the physician writing it from responsibility.[3]

6. LIABILITY FOR NEGLECT AS TO APPLIANCES

Physicians or surgeons are under implied obligation when they undertake to treat diseases or injuries to bring to their aid such obtainable remedies and appliances as discovery and experience have found to be the most proper and beneficial in aiding recovery. It has been held that a physician used proper appliances in the treatment of a fracture of a wrist, where "he called for pasteboard, and there was a basinful of milk-warm water, and he took the pasteboard and cut it up in two pieces and put one on each side,

[1] Long *v.* Austin, 153 N. C., 508.
[2] Harriott *v.* Plimpton, 166 Mass., 585.
[3] Murdock *v.* Walker, 43 Ill. App., 590.

and put a lot of cotton under them next to my [the patient's] hand; then he took a cotton strip and tied that hand up. I cannot just say how close the strips were to my elbow; he waited on me right along; he took the splints off when the time came to take them off; and he took them off once and looked at the hand eleven days between, and then put them back."[1]

An interesting action for malpractice, in the use of infected and unsterilized instruments, was decided in 1908, in the Supreme Court of Washington, unfavorably to the physician. The plaintiff, a widow, brought the action against a physician and surgeon in active practice in that State to recover for injuries received by her arising from alleged malpractice on the part of such physician in the use in and on her genital organs of unclean and unsterilized instruments, whereby there was communicated to her a loathsome disease technically known as gonorrhea, from which she suffered great bodily pain and mental anguish to her damage in a large sum of money. "The evidence on the part of the patient tended to show that she had been suffering for a number of years with some nervous affliction; that early in the year 1906 her trouble became more acute, when she called in the defendant to prescribe for her; that he examined her as to her symptoms and prescribed some form of medicine, which she took as directed, but which gave her only temporary relief; that the defendant thereupon stated to her that her symptoms indicated some derangement of the genital organs, and that if she would call at his office he would examine her for the purpose of ascertaining whether any such derangement was the source of her ill health; that she called as requested, on or about February 1,

[1] Stevenson *v.* Gelsthorpe, 10 Mont., 563.

1906, when the doctor proceeded to examine her genital organs, using for that purpose certain instruments, called a speculum and probe, which he took from a drawer nearby; that the instruments when taken from the drawer were wrapped in a towel, and were used upon her as they were when taken from the towel, without being washed or cleaned in any manner; that between five and ten days thereafter she began to be troubled with inflammation and pain in the parts affected, accompanied by a discharge, which gradually became more severe, causing her to take to her bed; that she again called in the defendant as her physician, stated to him her trouble, and received from him certain remedies, which she applied as directed; that he continued to treat her for about a month thereafter, when she notified him that she did not require his services further; that shortly after this he called at her residence and offered to treat her free, which she accepted, and for sometime thereafter he treated her medically, giving both internal remedies and remedies to apply locally in the form of suppositories; that during this latter treatment he made another examination with the speculum, and stated to her that she would probably have to be operated on surgically before she could be cured; that the respondent refused to submit to such an operation, whereupon he ceased to treat her further." The patient further testified that she was in bed most of the time suffering from pain in the genital region of her body, accompanied by a discharge of a purulent nature, between the time the defendant quit treating her and August 15, 1906, when she consulted another physician, who pronounced her disease to be gonorrhea; that this physician treated her for some three months thereafter, finally pro-

nouncing her substantially cured. She also testified that her husband died on January 11, 1906, and that she had not had sexual intercourse with him for some weeks preceding his death. She was not asked, and did not testify directly, that she had not had sexual intercourse with any other man, but did state that her husband had no venereal disease, and that there was no other way than from the defendant's instruments by which she could have obtained the disease. The physician treating her last also testified that when she called upon him in August, 1906, for treatment she was suffering from chronic gonorrhea, which he ascertained not only from her diagnosis symptoms, but by finding in the discharge from her genital organs the specific microbe of the disease. He testified also as an expert that the respondent could acquire the disease from an infected speculum used upon her in the manner she testified this one was used.

"The appellant [the physician] testified that he was called upon to treat the plaintiff in January, 1906, when he found her complaining with much pain in the side in the region of the liver and pleura and of considerable pain in the abdomen and right ovary; that later she complained of soreness in the ovaries and womb and some discharge; that he requested her to come to his office for an examination; that she did come, and he examined her genital organs, finding an enlarged condition of the womb, some inflammation of the mucous membrane, accompanied by a discharge; that in making the examination he used a speculum, a probe, and forceps; that these instruments were kept on the top of a medicine case in his office; that they never were kept in a drawer; that after using them he always washed them in mercuric iodine solution and soap and hot water, and imme-

diately before using them he sterilized them by boiling them in hot water in a receptacle on a gas stove in the back part of his office, and that it was in this manner that these instruments had been cleaned and sterilized before use on the plaintiff; that the last time he had used them on the plaintiff was on January 25, which was six days after he had used them on any other person, the last occasion using them on a woman suffering from chronic uterine trouble, not gonorrhea, and not infectious, and that he had not treated a case of gonorrhea in a female for many months prior to the time he treated the plaintiff."

He further testified that his office was heated by a steam heater operated only in the day time; that at night the office would become cold, running down to a temperature of from 50° to 55° F. The defendant also called a number of expert witnesses who testified, in substance, that gonococci, the microbes of gonorrhea, could not survive in a temperature as low as 50° or 55° F. for any length of time, certainly not as long as four days, especially upon a nickel-plated instrument such as a speculum. . . . In rebuttal two witnesses testified that the defendant had made an examination upon them similar to the one made on the plaintiff in April, 1906, and the other in June, 1906, and that in neither case did he sterilize the instruments before using them; that he took them from a drawer, where they were kept wrapped in a towel, and used them without cleansing or sterilizing in any manner.[1]

McClelland in his work on *Civil Malpractice* sets out an interesting case on the use of improper instruments in amputations. This case, it may be well to remark, occurred in 1871.

[1] Helland *v.* Bridenstine, 55 Wash., 470.

"In October [of the above year], Frederick Young, aged about fourteen years, living in Kerton, Illinois, while hunting, accidentally shot himself in the right forearm. The accident occurred about four o'clock in the afternoon, and a neighbor was immediately sent to inform Dr. Fullerton, of Bath, the family physician, and request his attendance. Accompanied by Dr. Hodnell, a dentist, Dr. Fullerton went to Young's, taking no instruments except his small pocket case. Dr. Hodnell proposed to go and get instruments, but Dr. Fullerton said he did not think they would be needed. They arrived at Young's about eight o'clock, and found the arm completely shattered to pieces at a point about midway between the elbow and wrist—the hand only hanging by ligaments. The boy had lost so much blood that he was greatly exhausted. He was placed under the influence of chloroform, and the hand and part of the mangled flesh cut away. Dr. Fullerton then called for a saw to saw off the bone above the wound. An old rusty hand saw was handed him, and according to Dr. Hodnell's testimony and Mr. Young's the defendant made an effort to saw off the bone with that coarse, rusty saw. Dr. Hodnell protested, and told him that was horrible. The defendant then desisted, and sent Mr. Young to Bath, to a cabinet maker, to get a tenon saw, and some place else, in Bath, to get a bottle of tr. myrrh. About eight o'clock A.M. [the next morning] Young returned with the saw; the boy was again put under the influence of chloroform, and the large bone of the arm sawed off, the muscles and skin pulled over and fastened with straps of adhesive plaster, the wound bathed with tincture of myrrh, a cloth wet with myrrh and sweet oil laid over it, and the stump tied up. The

small bone was not cut, and no stitches were taken in the muscles and skin. The defendant said he made 'flaps' by the method known as the circular operation, using a portion of the mangled flesh (after trimming it down). Other witnesses testified that he made no flaps, but forced the muscles over the bone by traction; or by pulling them down. He directed the wound to be bathed in tincture of myrrh. He frequently visited the boy and dressed the wound, and told the family it was 'doing well.' The boy, however, was sick for some time, the arm suppurated a great deal, and in about ten days after the operation a piece of small bone came out of the wound.

"A short time after that the wound began to heal somewhat, but left the end of the large bone exposed. All winter the arm was very troublesome, and toward the latter part of February, the wound still being painful, the defendant was called again, and told Mr. Young another operation would have to be performed. Young consulted another physician, who examined the arm and said it must be re-amputated. On March 10, Dr. Deffenbacker, of Havana, Dr. Browning, and Dr. Fullerton were at Young's and Dr. Deffenbacker performed a second operation, taking the arm off two inches farther up. He testified that the bone then protruded an inch or more beyond the flesh, and was decayed or necrosed. Dr. Browning testified to the same effect. The wound after this operation healed in about ten days. . . . The surgeon's duty in such a case was, first, to suppress any hemorrhage that might have been present. This being accomplished, he should have sent for the proper instruments, and these instruments need not have been those expressly prepared for amputating limbs. The instruments carried in an ordinary pocket

case, although not the best, will answer excellently for making the flaps in an amputation of the arm, whether it be by the circular method, or otherwise; a sharp, keen butcher knife would perhaps answer better, and would very properly be used if the occasion required. For section of the bones a tenon saw, if in good condition, would be a very proper instrument; so also would a hand saw, but not such an one as appeared in evidence unless no other instrument could be procured within twenty-four hours, which evidently was not the case in this instance. A glance at such an instrument should have satisfied the surgeon of its unfitness."[1]

The court in a Tennessee case which involved the amputation of an arm with a butcher knife and a carpenter's saw said: "It certainly requires some degree of skill in anatomy and surgery to perform an operation of the kind, and the success that attended it, though not conclusive, is a circumstance from which skill may be inferred. The instruments employed, drawn from other vocations, not the most congenial for the special occasion, were certainly unusual and extraordinary for such a purpose. But we are not to infer from this circumstance alone that the surgeon had not sufficient art and skill in the use of them; besides, it is possible that the delay necessary to procure proper instruments might have been fatal to the patient."[2]

7. LIABILITY FOR FAILURE TO GIVE PROPER INSTRUCTIONS

It is the duty of the physician to give such instructions as are proper and necessary to enable the patient

[1] Young *v.* Fullerton, Fulton Circuit Court (Ill.), quoted in McClelland's Civil Malpractice, p. 253.

[2] Alder *v.* Buckley, 1 Swan (Tenn.), 69.

or his nurses and attendants to act intelligently in the further treatment of the case, and a failure to do so is negligence which will render him liable for injury resulting therefrom.[1] A physician who has set a broken leg is bound to give proper instructions for the use and care of it, and for failure to do so he is liable in case of a resulting injury.[2] "It is the duty of the surgeon when he takes charge of a case, such as a broken femur bone, to give his patient all necessary and proper instructions as to what care and attention the patient should give his broken limb in the absence of the surgeon, and the caution to be used in the use of the limb before it is entirely healed."[3]

If in a case of dislocation of the elbow-joint it is enough for the physician to replace the bones, and to put the arm on a pillow, with the part below the joint at a right angle with that above it, and directing the application of cold water, it would seem to be proper, if not necessary, that the attending surgeon should inform the patient or those having charge of him or her of the necessity of maintaining that position; and if there is a tendency in the limb to become straight, or if in consequence of the severity of the injury to the ligaments about the joint there is great pain, which renders the patient nervous and restless, thus increasing the tendency to relaxation or to straighten, and as a consequence to stiffen the joint, the danger should be disclosed, to the end that all proper precaution may be taken to prevent it.[4]

[1] Carpenter *v.* Blake, 60 Barb. (N. Y.), 488; Pike *v.* Honsinger, 155 N. Y., 203; Beck *v.* The German Klinik, 78 Ia., 696.

[2] Beck *v.* The German Klinik, 78 Ia., 696.

[3] Fish *v.* Welker, 4 Ohio Legal News, 433.

[4] Carpenter *v.* Blake, 60 Barb., 488.

8. LIABILITY FOR ABANDONMENT OF CASE

The employment of a physician continues while sickness lasts, unless put an end to by the assent of the parties or revoked by the express dismissal of the physician,[1] the character of a physician's services being such that he cannot quit the services without cause or reasonable notice.[2] But where the employment of a physician has been terminated, he may refuse further attendance, and such refusal, where there is no further showing save that the patient was suffering the pain usual in such cases, will not justify the admission of evidence that the same amounted to improper treatment.[3] A physician who leaves a patient at a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty.[4]

9. LIABILITY FOR PERFORMING OPERATION WITHOUT PATIENT'S CONSENT

A physician is liable for operating upon a patient unless he obtains the consent of either the patient, if competent to give such consent, or, if not, if some one who, under such circumstances, would be legally authorized to give the requisite consent. Consent will be presumed in certain cases unless the person operated on has been the victim of false and fraudulent representations, or has been deliberately deceived.[5]

[1] Tomer *v.* Aiken, 126 Iowa, 114; Lawson *v.* Conaway, 37 W. Va., 159, 16 S. E., 564.

[2] Gillette *v.* Tucker, 67 O. S., 106.

[3] Tomer *v.* Aiken, 126 Iowa, 114.

[4] Barbour *v.* Martin, 62 Me., 536.

[5] Mohr *v.* Williams, 98 Minn., 494.

As was said in an Illinois case: "Except in cases where the consent of the patient is expressed, or is implied by circumstances and occasions other than a mere general retainer for medical examination and treatment, and except, also, where there is a superior authority which can legally and rightfully dispose of the person of the patient, and which gives consent, a surgeon has no right to violate the person of the patient by a serious major operation, or one removing an important part of the body."[1]

The party who allows a surgical operation to be performed is presumed to have employed the surgery for that particular purpose.[2] Thus it has been held that the vaccination of a passenger by a ship's surgeon will not constitute an assault if the passenger's behavior indicates consent, whatever may be his unexpressed feelings on the subject.[3] An operation upon the left ear of a patient without her consent, express or implied, after she had consented to an operation upon the right ear, is wrongful and unlawful.[4]

To justify a surgical operation upon a married woman, her consent and not that of the husband is necessary.[5]

As was said in a Michigan case: "It would be a cruel rule for a wife if she could not in her husband's absence at least or in his presence, if he does not himself provide for her, make a binding contract for any necessaries, whether articles to be purchased or professional help, without becoming a public charge. It is not to be expected that physicians and surgeons

[1] Pratt *v.* Davis, 118 Ill. App., 161.

[2] State, use of Janney *v.* Housekeeper, 70 Md., 162.

[3] O'Brien *v.* Cunard Steamship Co., Mass.

[4] Mohr *v.* Williams, 98 Minn., 494.

[5] Pratt *v.* Davis, 118 Ill. App., 161; State, use of Janney *v.* Housekeeper, 70 Md., 162.

will always feel bound to render gratuitous treatment to injured persons, and when the occasion is pressing it would be unreasonable to delay until an absent husband is communicated with to learn whether he consents or refuses to assume her contracts. Time will not allow minute inquiries, and humanity will not prompt them."[1] The consent of a man to an operation upon his insane wife upon taking her to a hospital is exhausted when the operation is performed and she is taken away, so as not to justify another operation if she subsequently returns to the institution. And consent by a man to an operation upon his wife for the removal of her uterus and ovaries is not shown by the fact that after an operation of a minor nature, to which he consented, which did not prove successful, he complied with a direction to bring his wife to the surgeon again for treatment.[2]

Whether the consent of the parent or guardian of an infant or person non compos mentis, who is to be operated upon, should first be obtained, has not as yet been settled. The safest course is to secure such consent whenever possible. Failure to obtain the father's consent before administering an anesthetic to a youth, aged seventeen years, who in company with adult relatives has applied to a surgeon to be relieved from a small tumor, will not render the surgeon liable to the father for the death of the boy under its influence.[3]

An interesting case on the consent of a patient is reported by Professor Kinkead in his work on *Torts*, a case he refers to as coming within his experience: "A woman consulted her family physician, who advised her that an operation was necessary, and that she

[1] Carsten *v.* Hauselman, 61 Mich., 426.
[2] Pratt *v.* Davis, 224 Ill., 300.
[3] Baker *v.* Welsh (Mich.), 108 N. W., 94.

should go to a hospital and have the surgeon of the hospital treat her. The surgeon, upon examination in the presence of physicians and nurses, advised that an abdominal operation was necessary to save her life. She submitted to the preparation without protest, the operation was successful, she became a well woman, but finding that she was without the power of procreation, declaring that the operation was without her consent, brought suit against the surgeon, the sole ground being the want of consent, it being the opinion of the best surgeons that the course pursued was the only one to be followed in the treatment of such a case surgically. The court, Williams, J., in the charge correctly stated the law: 'Did the defendants . . . without the consent of the plaintiff unlawfully perform upon said plaintiff the operation complained of? If you should find that said operation was performed, you will then determine whether or not it was with the consent of the plaintiff. She alleges that it was without her consent, and it is incumbent upon her to prove this charge. The consent of a person submitting to an operation is presumed unless she was the victim of a false and fraudulent misrepresentation as to her physical condition and the necessity of the operation; she is presumed to have consented to the performing of such operation. But such false and fraudulent misrepresentation, if relied upon, is a material fact to be established by proof the same as any other material fact. . . . The consent of the patient was necessary before the defendants . . . could lawfully perform the operation which it is claimed was performed. If such consent was not given, then said defendants had no right to operate in the manner complained of. But if C. could not appreciate and

know her condition, and if she placed herself in the care and hands of said defendants, authorizing them to do whatever seemed reasonable from their knowledge and skill as physicians and surgeons to save her life or to protect her from continued and serious illness, such consent to the performing of such operation as was, in the exercise of ordinary surgical care and skill, considered reasonably necessary, and in that event it will not be necessary for you to find that she gave express consent. . . . If you find that the consent of the plaintiff was given for an operation which was termed the scraping of the womb, and that she did not consent to the operation which is claimed to have been performed, then the consent to the scraping of the womb cannot be interposed to excuse said defendants or to justify them in performing some other different operation. In determining whether or not the consent of the plaintiff was given for the performing of the operation charged, you may consider the testimony concerning the conversation between the plaintiff and said defendants, as well as the extent and nature of the preparation made, with the knowledge and understanding of the plaintiff, for the performing of such operation. The consent of relatives or friends of the plaintiff was not necessary to authorize the defendants . . . to perform said operation.' "[1]

The consent of a patient to be treated by a Christian Science healer will preclude his holding him liable in damages for failure to effect a cure, although that method of treatment is illegal under the State law.[2]

[1] Cuthreil *v.* Protestant Hospital et al., Franklin County, Ohio; Com. Pleas Court, unreported.

[2] Spead *v.* Tomlison, 73 N. H., 46.

10. LIABILITY FOR FAILURE TO SECURE CONSENT TO PERFORM AUTOPSY

Time will not permit and the occasion does not require us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. A quite full and interesting discussion of the subject will be found in the report of the referee in a case reported in 4 Bradb. Sur., 503. Upon the question who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right; the English common law authorities are not very helpful or particularly in point, for the reason that from a very early date in that country the ecclesiastical courts assumed exclusive jurisdiction of such matters. It is easy to see therefore why the common law in the early stages refused to recognize the idea of property in a corpse, and treated it as belonging to no one unless it was the church. The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead, and of the living in their dead. Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters and administer remedies as in other analogous cases. This has been accomplished by a process of gradual development, and all courts now concur in holding that the right to the possession of a dead body for the purpose of decent burial belongs to those most intimately and closely connected with the

deceased by domestic ties, and that this right is one which the law will recognize and protect. The general, if not universal, doctrine is that this right belongs to the surviving husband or wife or to the next of kin, and while there are few direct authorities upon the subject, yet we think the general tendency of the courts is to hold that in the absence of any testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of next of kin. We have therefore no doubt that a wife has the legal right to the custody of her husband's body for the purpose of preservation, preparation, and burial, and can maintain an action for the unlawful mutilation of the remains. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful mutilation of the body, although no actual pecuniary damage is alleged or proved.[1]

Thus it has been held that a widow whose husband having fallen through an elevator shaft was taken to Bellevue Hospital, where he died three hours later, and who begged those who were in charge of his body not to allow an autopsy to be performed, stating that she would send an undertaker for the body at once, is entitled to damages for the unauthorized mutilation of his body, notwithstanding her request and protestations.[2]

The father of a child, who is its natural guardian, has a right in case the child dies to the possession of the body for burial, and may maintain any action for an unauthorized autopsy performed on the dead body of the child.[3]

[1] Larson *v.* Chase, 47 Minn., 307.
[2] Foley *v.* Phillips, 1 App. Div. (N. Y.), 551.
[3] Burney *v.* Children's Hospital, 169 Mass., 57.

A physician, however, who makes a postmortem examination in the usual manner and in pursuance of the authority of the coroner is not liable in an action to the family of the deceased for the mutilation of his body without their consent. And doctors are not liable for performing an unauthorized autopsy on a dead body for the purpose of complying with a rule of the board of health and securing a burial permit.[1] For example: A man in vigorous health, whose leg had been crushed below the knee in a railroad accident, and who was carried to a hospital managed by one of the defendants, where he died the next day, was examined by the defendant, upon the ordering of a postmortem examination by the coroner, without the knowledge of the deceased's family. Here the physician was not held liable, on the ground that he performed the postmortem by order of the coroner, and did so without wantonly mutilating the corpse.[2] Neither will an action for damages lie in favor of the heirs of a deceased person against a physician who made a postmortem examination of deceased's body under the authority given him by a city ordinance, which required a physician's certificate of the cause of death before burial of the body of a deceased person, where the circumstances of death in a certain case are such as to render such an examination necessary. For illustration, where the death was sudden and occurred in a hack.[3]

11. LIABILITY OF SURGEONS IN PARTICULAR FOR MALPRACTICE

In the performance of all operations upon the human body the surgeon must bring to the work

[1] Meyers *v.* Duddenhauser (Ky.), 90 S. W., 1049.
[2] Young *v.* College, 81 Md., 358.
[3] Cook *v.* Walley & Rollins, 1 Colo. App., 163, 27 Pac., 950.

that degree of knowledge, care, and skill necessary and usually exercised by surgeons of ordinary knowledge, care, and skill, with respect to the particular operation called in question, in the locality of the residence of the surgeon whose conduct may be called in question, or in similar localities. In addition to this, the surgeon must use his best judgment, and use precautionary measures to guard against an anticipated injury. Reasonably prudent surgeons are required to foresee such injuries as ordinarily prudent surgeons may reasonably expect to result, and to guard against the same. It is the very peril of physical injury which necessitates a code of precautions in diagnosis and treatment by physicians and surgeons. For instance, the precautions to render an operation aseptic are adopted for no other reason than that every physician anticipates injury to the patient as probable in their absence. "It is unreasonable to say," says a Wisconsin court, "that a physician may improperly and negligently excoriate the lining of a delicate internal organ, and escape liability, by doubt as to whether he, in the exercise of reasonable care, should have anticipated injury to the patient thereby. The relationship between such an act of the physician and the physical condition of the patient is so intimate that he must necessarily anticipate some physical effect as the result of such operation, and, of course, that such effect will be bad if his act be improper or improperly done." This case, decided in 1902, is probably the first case wherein there is found a declaration of the necessity of this element of anticipation of injury from professional negligence in medical treatment or surgical operations. The facts of the case were substantially as follows: The plaintiff, about thirty-five years of age, having been long a sufferer

from uterine trouble, which, however, did not incapacitate her from doing the ordinary work of a farmer's wife, went for treatment to the defendant, who maintained a sanitarium for the treatment of chronic diseases of various sorts. After a day or two of preparation there was performed on her the operation of curettement of the uterus. That the defendant failed to anticipate the infection of other parts of the body, especially the ovaries, as a result of which other parts of the patient's body became infected, and pus formed in the right ovary; and that the operation was performed without ordinary precautions to render it aseptic, and to guard against infection from the outside.[1]

Another similar case, decided in 1907, arose from the following state of facts: A physician had been called to reduce a fracture, and knowing that spring water had for some hours been applied to the limb after its injury, bandaged it too tightly. In applying the law to this state of facts the court says: "As to the germs or microbes causing the mortification, it was only a possibility, but even if caused in this way it would not of itself have relieved appellant [the physician] from responsibility. He was informed when appellee received her injury that the applications of this cloth saturated with cold spring water had been made, and he should have used reasonable care and skill to have ascertained whether her arm was infected or not, and if so, treated her for this infection, and if he failed in this he is responsible."[2] A physician has been held guilty of malpractice where he has been called in to treat a woman, aged sixty-one years, who fell in November and fractured a

[1] Allen *v.* Voje (Wis.), 89 N. W., 924.

[2] Baute *v.* Haynes, 31 Ky. L. Rep., 876, 104 S. W., 272.

femur, and he takes her to his sanatorium, but does not operate on the broken hip, merely keeping the leg in position by sand-bags and afterward by a plaster cast and extension. Although he set up as the defence that at the time of the accident, and afterward, the patient was suffering from tuberculosis, and that her temperature rose to a dangerous point, and that it was not the proper treatment to perform a surgical operation on her at that time.[1] And physicians called to set the broken limb of a nine-year-old boy are negligent and guilty of malpractice where they bandage the leg so tightly as to retard or stop the circulation of the blood, thereby causing gangrene to set in, and necessitating the amputation of the leg.[2] "But if a surgeon, when called, advises a patient who is of mature years and of sound mind that the operation is unnecessary and improper—in short, advises against the performance—and the patient still insists upon the performance of the operation, in compliance with which the surgeon performs it, we do not see upon what principle the surgeon can be held responsible to the patient for damages, on the ground that the operation was improper and injurious. In such cases the patient relies upon his own judgment, and not upon that of the surgeon, as to the propriety of the operation; and he cannot complain of an operation performed at his own instance and upon his own judgment and not upon that of the surgeon."[3] A physician cannot be charged with the loss of a foot by amputation following a Pott's fracture and treatment by him as a physician, in which a plaster cast was used to set the broken bone, where the opinions

[1] Miller *v.* Leib, 109 Md., 414.
[2] Jamison *v.* Hawkins, 13 Pa. Super. Ct., 372.
[3] Gramm *v.* Boener, 56 Ind., 497.

of expert witnesses as to the cause of the amputation did not support the contention that the result more probably came from the method of treatment than from the injury.[1] A physician is liable for leaving a tight bandage upon a broken arm six weeks without removal, causing formation of ulcers and gangrene.[2]

Physicians who treated a patient for a fracture of the bone of the arm about an inch above the wrist by applying splints to the arm to hold the broken bone in place have been held not to be liable in a malpractice suit, where two black spots appeared on the surface of the wrist when the splints were removed, and which subsequently developed into ulcers and resulted in a permanent injury to the patient's arm. It appearing that the patient, aged twenty-three years, fell on the sidewalk and fractured her arm; that she went to the office of the defendant, Carman, who was not in, but was referred by somebody in the office to the other defendant, who set the fracture and applied splints; that the next morning both defendants saw the patient at her residence, took off the splints, examined the arm, and put on other splints, placing under the splints small pads of cotton to keep the broken bones in place; that the defendant, Carman, saw the patient again on the three succeeding days; that on the fifth day after the accident he removed the splints and found a tendency at the ends of the bones to tilt up; that he replaced the splints, with the pads of cotton, as he thought tight enough to hold the bones in place so that there would be a good union; that three days thereafter the defendant, Carman, saw the patient, removed the bandages, but did not remove the splints.

[1] Farrell *v.* Haze, 157 Mich., 374.

[2] Mitchell *v.* Hindman, 47 Ill. App., 431, affirmed, 150 Ill., 538.

There was no evidence that at that time there was any mark on the wrist, but the patient complained of pain, and the hand was swollen and discolored; that the plaintiff called at his office about two weeks after the removal of the bandages, when the defendant, Carman, had been taken ill; that then he made no further examination, but referred the patient to the other defendant, telling the patient that he was going away; that he was confined to his bed with illness for three weeks, when he left town and did not return until ten days thereafter; Dr. Cooke, the other defendant, treated the arm for some time during Dr. Carman's absence, and then referred the patient to another physician, who was not in. The patient subsequently called on another physician, who treated her for a year and a half, and the result was that the wrist-joint was stiff, the movement of thumb and fingers much impaired, with a loss of sensation, and that this condition will be permanent. The court in deciding that the defendants were not guilty of malpractice said: "The evidence is undisputed that he was ill and absent and did not again see the patient, and so far as appears, he had no further charge of the case.

"There is no evidence to show that up to the time the physician was taken sick he was guilty of any want of reasonable care of or attention to the plaintiff's case. There is nothing to show that his visits were not as frequent as the situation required. . . . I think the evidence is undisputed that up to the time the patient was taken sick and turned the case over to the other defendant his treatment was just what is here described by the patient's expert 'as good surgery by good surgeons.'" He adjusted the splints with the amount of pressure that he considered necessary to hold the broken bone in place.

The result was "a splendid union." There is nothing to show that if there had been less pressure there would not have been a faulty union or that there was more pressure applied than was necessary to hold the broken bone in place. That was a matter which depended upon the judgment of the physician. That the splints were not removed sooner was not the fault of Dr. Carman, and there is nothing to show that these black spots, which afterward developed into ulcers, had appeared when the appellant ceased to attend the plaintiff. For what happened afterward he was not responsible.[1]

Failure to Remove Sponges.—It is negligence on the part of an operating surgeon to fail to remove all the sponges from the body of the patient upon whom he performs an operation, without regard to what system he adopts to insure their safe removal. He is the responsible person and must adopt such a method of counting as will insure their removal.[2] As was said in a supreme court decision in Georgia: "We must admit that we are unable to apprehend any clear distinction between the duty of the surgeon at the different stages of what for want of a better term we call the operation. It seems to us that the operation begins when the opening is made into the body and ends when this opening has been closed in a proper way after all appliances necessary to the successful operation have been removed from the body. From the time the surgeon opens with his knife the body of his patient until he closes in a proper way the wound thus made the law imposes upon him the duty of exercising not only due care but due skill as well.

[1] MacKenzie *v.* Carman, 103 App. Div. (N. Y.), 246.

[2] Harris *v.* Fall, 177 Fed., 79; Akridge *v.* Noble, 114 Ga., 949; 41 S. E., 78; Reynolds *v.* Smith (Ia.), 127 N. W., 192; Gillette *v.* Tucker, 67 Ohio St., 106.

During the entire time he must not only know what to do, but he must do it in a careful and skilful manner."[1] In the Georgia case the surgeon who performed the operation was assisted by nurses and hospital attendants, and the gist of the case was that a small sponge or gauze pad was left in the abdomen. The court instructed the jury that surgeons must use ordinary care and skill in making the incision, in removing parts of the body, in closing up the incision, and due care in the use and handling of sponges or pads. The appellate court, speaking with reference to this, says that "it may seem at first blush that if the surgeon put the sponges inside of a patient's body, care would require him to take them all out. But when we remember that abdominal surgery as now practised is largely a matter of a few years' growth, that until quite a recent period it was considered that an incision or wound which penetrated the abdominal cavity was certainly fatal, and that now such operations are very frequently performed; that the surgeon must make a small incision, not over a few inches in length, must insert and properly place a number of small sponges or gauze pads, sometimes as many as a dozen, must partly by sight and partly by feeling reach the seat of the trouble and cut away the necessary parts, must tie up the loose ends, remove the sponges, and close and sew up the opening, arranging for proper drainage, and all this with the utmost promptness, for sometimes a slight delay may mean death, circumstances and surroundings must be considered in measuring duty. Some of the witnesses in this case testified that with the surgeon's mind and attention riveted upon the delicate and dangerous work before him it was very difficult,

[1] Akridge *v.* Noble, 114 Ga., 949.

if not impossible, to keep in his memory the exact number and placing of these sponges, that he needs rely somewhat for the count upon another, that he exercised such care and skill as he could in finding the sponges, and then had the operating nurse to aid him by keeping count of them; and one or more said that if the surgeon should stop at the critical moment to count the sponges before closing the wound the patient might die. This system may be imperfect. What system is not? But certainly it would never do to turn juries loose to fix some arbitrary standard—each jury for itself—of how abdominal surgery ought to be performed, regardless of how the surgeons themselves had found it safest and best to do; nor, which would amount to the same thing, to say whether a method of performing an operation, even if universally adopted by the most skilful surgeons, seems reasonable to the minds of the jurors or not. This is specially true when the practice of surgery is permitted only to those who have studied the recognized methods, have had certain training and have been found to be sufficiently proficient, and have been licensed. If the practice of surgery were thrown upen to everybody, to act on his general judgment, without skill or training perhaps the rule might be different. The average juror might, in such a case, be able to judge of the mode of performing operations as well as the practitioner of whom no training, skill, or knowledge were required. If all surgeons had perfect reason and perfect skill there should be no failures. Medical and surgical science must advance gradually. It has its errors and its failings. But it would hardly do for every doctor who gives a prescription, or for every surgeon who performs an operation, to do so at the risk that if the result is not good a jury may

mulct him in damages, if they should think the method of treatment or of conduct was unreasonable, although it was the universal method." The law laid down by the supreme court (the reviewing court), however, is that the law requires of the surgeon that he must exercise care not only in placing the sponges, but also in removing the same, because their removal is a part of the operation.[1]

Another case of this character arose in Kentucky. Here the surgeon after performing an operation left in the patient's abdomen a sponge, which caused the intestines to ulcerate, creating a fistula which emitted fecal matter and noxious gases, to the serious impairment of the plaintiff's health. In this case physicians testified that the best surgeons sometimes left a sponge in the bodies of their patients in performing similar operations, but the court held that the question whether the physician exercised proper care was still for the jury, since because all men are at times careless does not relieve one from the legal con-consequences of his careless act.[2]

A United States court has held the evidence in an action against a surgeon for negligence in performing an operation for appendicitis sufficient to warrant the submission of the case to the jury, where the evidence in the record is such that the jury would be fully justified in finding the following facts: "On March 30, 1907, at Keokuk, Iowa, R—— [the surgeon] for a consideration agreed upon, at the request of Johnson [the patient], performed upon the latter an operation for appendicitis. When R—— opened the abdomen he found extensive adhesions caused by frequent recurrences of the attacks of appendicitis.

[1] Akridge *v.* Noble, 114 Ga., 950.
[2] Samuels *v.* Willis, 133 Ky., 459.

He immediately placed pads of gauze in the opening to wall off the infected area. The appendix was then brought up, the cecum with it, and as the appendix was brought up the sac ruptured, and R—— called to his assistant to get a pad quickly. The assistant got the pad and R—— called for another. Another pad was gotten and placed in the body. R—— did not remember how many pads he put into the abdomen. Johnson's case is one known to surgery as a pus case. When R—— had finished the operation the sponges or pads of gauze that were removed from Johnson were dropped into a tub. At the time of the operation a stab drain was put in so as to give a direct outlet from the cavity. About two weeks after the operation, while Johnson was still being treated by R——, a lump formed at the lower end of the main incision, and kept getting larger until it was about the size of a hen's egg. R—— was informed of the lump, and upon examination decided that it was an abscess. The lump or abscess was opened by R—— and blood and pus came therefrom. R—— mopped out the blood and pus, ran the handle of his knife into the opening, probed open the stab wound, and placed a tube in the abscess wound. Johnson remained at the hospital until May 2, 1907. When Johnson left the hospital at Keokuk he went home to Lockridge, Iowa, and was there cared for by one Dr. M——, who examined his wounds and found that the abscess wound extended down into the abdominal cavity. Pursuant to instructions contained in a letter which Johnson brought from Dr. R——, Dr. M—— each day treated the abscess wound and the stab wound with pieces of gauze, one-fourth of an inch wide, and four or five inches in length. Sometimes the pieces of gauze were eight or ten inches long, but narrow. The discharge from the abscess

wound and stab increased until about four weeks after Johnson went home, when Dr. M—— called Dr. R—— over the telephone and told him that the wounds were discharging worse than when Johnson came home, and asked for advice. R—— told him to keep the drain in and Johnson would get along all right. M—— did so, but the discharge kept getting worse, and on June 1, 1907, M—— called R—— over the telephone and told him that Johnson's condition was getting worse, and that there certainly must be something wrong. About July 1, 1907, Johnson became deathly sick and began vomiting. The odor from the abscess wound was something awful. It was getting rotten. Johnson went five days without a passage of the bowels. Gas began to come out of the opening, and about July 3, 1907, fecal matter began issuing out. Sharp, excruciating pains came from the region of the bowels and a dull, stupid feeling over all. The fecal matter kept coming out of the drainage places and soiled his clothing and dressings. Dr. M—— telephoned a Dr. C——, of Fairfield, a short distance from Lockridge, to come over at once, that something had to be done. Johnson's temperature was then 103°, his pulse 120; he was vomiting badly, and was bloated on his right side. On July 7, 1907, Dr. C——, assisted by Dr. M——, opened the abdominal cavity of Johnson by cutting down so that the end of the original incision that was made united with the lower end of the original incision made by R——. C—— introduced his finger and could feel gauze. He then put in his forceps and pulled out the gauze in question. When the gauze came from the abdomen, two and one-half to three inches had penetrated the ascending colon. When the gauze was removed a pint of fecal matter came out with it, and

Dr. C—— introduced his fingers into the hole left by the gauze in the colon. On January 1, 1908, the wound had healed, and Johnson for the first time was able to have a natural movement of the bowels. It was stated that the size of the piece of gauze taken from Johnson was 9½ inches by 11½ inches; that the pads used at the time of the operation by Dr. R—— were from 8 to 10 inches square; that with free open drainage such as existed in this case the gauze could have remained in the abdominal cavity without any further disturbance than did actually occur; that the gauze pad had been in the abdominal cavity from ninety to one hundred days; that after Johnson came to Dr. M—— there never was at any time prior to the operation by Dr. C—— an opening in Johnson's abdomen large enough to have permitted the introduction of the pad of gauze removed therefrom; that the presence of the gauze in Johnson's abdominal cavity was the cause of illness subsequent to the operation for appendicitis. There was evidence tending to show that all of the pads of gauze that were placed in the abdominal cavity of Johnson at the time of the operation for appendicitis were removed, but no witness had any actual knowledge as to whether they were or not. Dr. R—— testified himself that he did not know how many pads were placed in the abdominal cavity, and the nurses who seemed to have charge of furnishing the pad or sponges at the hospital could only testify that the pads were removed by reason of the fact that they were always removed in every case. No witness had a distinct recollection of what was actually done in this particular case with reference to removing the gauze pads."[1]

[1] Ruth *v.* Johnson, 172 Fed., 191.

12. MALPRACTICE IN VACCINATION

In an action against a physician and surgeon for malpractice in his profession it was generally averred that the defendant, in consideration of being paid for his skill and labor therein, undertook to inoculate the plaintiff with the kine pock, in a proper and skilful manner, but in the performance of his duty he so unskilfully treated her that he cut a tendon in her arm, to her injury, etc. The defendant prayed the court to charge the jury that unless the plaintiff had proved the defendant guilty of great and gross negligence in vaccinating the plaintiff she could not recover. The court told the jury on this point that if there was either carelessness or a want of ordinary diligence, care, and skill then the plaintiff was entitled to recover. The principle laid down by the court below is entirely correct. "The case was put to the jury as favorably for the defendant as the law would justify. If in the performance of the operation there was a want of ordinary diligence, care, and skill, or if there was carelessness, then he was liable."[1]

13. LIABILITY FOR COMMUNICATING CONTAGIOUS DISEASES TO PATIENTS

A physician who communicates to his patient an infectious disease is responsible in damage for the suffering, loss of time, and danger to which the patient may be subjected.[2] And a surgeon is liable in damages where he directs his patient's wife to assist in dressing a wound, knowing that there was danger of infection,

[1] Landon *v.* Humphrey, 9 Conn., 209.
[2] Piper *v.* Menifee, 12 B. Mon. (Ky.), 465.

but negligently assuring her that there was no such danger, and she relies on his advice and becomes infected with poison.[1]

14. LIABILITY OF PHYSICIAN FOR INJURIES FROM ELECTRICAL OR X-RAY TREATMENT

The rule governing the liability for injuries resulting from the use of the *x*-ray is the same as in other actions for malpractice. The physicians not being required to exercise any greater degree of care and skill than is usually exercised by physicians or surgeons in good standing.[2] Nor is the physician an insurer of the success of treatment by the *x*-ray, or that it will not be attended by unexpected results; but he is only required to have the necessary learning and experience to give the treatment in a careful and prudent manner.[3] It has been held in one State that the fact that a patient was burned by an *x*-ray is itself evidence that the treatment was improper;[4] and in another, that a jury is justified in concluding that the use of the *x*-ray by one who has little knowledge of the consequences is negligence per se, where some of the testimony tends to show that the physicians in the community are ignorant of the effect of *x*-ray exposures.[5] But a different result was reached in another jurisdiction where it was held that this fact was not evidence of negligence, and did not throw the burden on the defendant of showing that the injury was not caused by his negligence.[6]

[1] Edwards *v.* Lamb, 69 N. H., 599, 45 Atl., 480.

[2] Shelly *v.* Spohn, Cir. Ct. Ind.; Henslin *v.* Wheaton, 91 Minn., 219; Martin *v.* Courtney, 87 Minn., 197; Gere *v.* Brockman, 138 Mo. App., 231.

[3] Gere *v.* Brockman, 138 Mo. App., 231.

[4] Shockley *v.* Tucker, 127 Ia., 456.

[5] Sauers *v.* Smits, 49 Wash., 557.

[6] Sweeney *v.* Erving, 38 Wash. L. Rep., 295.

It has been held that a physician who after placing a patient on an insulated platform puts a conical cap above and in front of the patient's head, through which static electricity is discharged, and leaves the room for eight to ten minutes, during which no attendant is present, is guilty of actionable negligence rendering him liable for the burning of the patient's head by the electricity during such absence from the room.[1] And a patient who is burned by *x*-ray light is not precluded from recovery for her injury because she quits his treatment before she should have done so, and before he wished her to, or by the fact that she neglected to follow his instructions as to the care of the part affected.[2]

In an action against a physician for malpractice in the treatment of a patient's hand by the application of *x*-rays a verdict in favor of the plaintiff has been held to be justifiable where the evidence showed that "defendant was a physician and surgeon and was practising his profession in the city of St. Louis from the time he graduated in 1897. The plaintiff was a machinist. At the time plaintiff first went to see the defendant concerning his injury he was twenty-eight years of age, and married. While working at his trade he sustained a supposed scratch in the palm of his hand. Later a red spot, about the size of a half dollar, appeared in the centre of the palm of his right hand. It is claimed by him that this spot did not pain him nor inconvenience him in the performance of his work. On August 10, 1901, he went to the defendant's office to consult him about the spot in his hand, and he claims that defendant told him he had a chronic disease known as dry tetter or eczema,

[1] Frisk *v.* Cannon, 112 Minn., 438.
[2] Sauers *v.* Smits, 49 Wash., 557.

and that he could cure it. Plaintiff claims that he then and there employed defendant to treat his hand for the ailment, and that the defendant commenced to treat him by applying a salve to the spot in the hand, and that at the time plaintiff employed defendant to treat his hand defendant persuaded him to join the St. Louis Hospital Ticket Association, which was a hospital conducted by the defendant. The plaintiff testified that defendant told him the hospital did not treat persons for chronic diseases, and that he would give him the treatments.

The plaintiff claims that for more than a year the defendant treated him with certain applications, but no benefit was obtained therefrom; that in September, 1902, defendant told him he would have to use the *x*-rays on the hand, and that he would charge him $1.00 a treatment therefor; that at the time arrangements were made for the *x*-ray treatment he was told by the defendant that it would cure him, and that it would not interfere with his work; that the defendant did apply the treatment to his hand, and told him to hold the palm of his hand about half an inch from the energized tube from which the rays emanated; that defendant exposed his hand to such rays or currents nine times in eleven days, each time directing him to hold his hand about half an inch from the said tube; and that these exposures varied from ten to thirty-five minutes. Plaintiff claims that after the eighth treatment he complained to the defendant that his hand was burning him and paining him, and afterward defendant gave him another treatment for ten minutes' duration.

Plaintiff further claims that on different occasions defendant left him with his hand thus exposed, and went to attend other business, and at certain times

gave the plaintiff instructions when to turn off the current; that the hand became badly swollen; that the defendant scraped the skin until he got nearly all the skin removed from the palm of the hand, and, in addition thereto, that he scraped the hand for the purpose of removing the parts appeared to have been burned or cooked by the *x*-rays; that he suffered great pain from the time the *x*-ray treatments were applied; that he could not sleep nights, and the defendant gave him laudanum, but he got no relief; that these treatments of scraping and dressing the hand continued until February 10, 1903, when the treatments caused such pain and suffering that he could not stand it, and he then left the defendant and went to another physician, who commenced treating the hand, resulting finally in relieving the pain and causing the hand to heal, but left it in such shape that he now has what the physicians call a "claw hand."

"The defendant and his witnesses testified that the hand was exposed the number of times claimed by the plaintiff, but there was a protection placed over all parts of the hand except the spot to be treated, and that while the treatments varied from ten to thirty minutes, the plaintiff's hand was placed not closer than six inches to the tube, and he was cautioned to keep it at that point."[1]

15. LIABILITY FOR DECEIT

The general rule is that a mere expression of an opinion that a cure can be effected is not fraud. The reason most frequently given for the rule is that the opposite party has no right to rely on it, and that, therefore, he cannot be misled by it. Another reason

[1] Hales *v.* Raines (Mo.), 130 S. W., 425.

is that there is no adequate means of proving that the opinion as expressed was not truly entertained, and it could scarcely be said to be fraudulent if it was an honest opinion. There are, however, well-defined exceptions to the rule. If the opinion is designedly false, or advantage is taken of the other party in a manner which is clearly oppressive without any negligence on the part of the latter, there may be fraud, although the statement is only in the form of an opinion. Thus where a party possesses special learning or knowledge on the subject with respect to which he expresses an opinion, a false statement and representation made to one who is ignorant upon the subject, where deception is designed and injury follows from reliance upon such an opinion, will support an action for deceit.[1]

In the case of Hedin *v.* Minneapolis Medical and Surgical Institute, cited to the general rule, Justice Collins, speaking for the court, said: "The doctor, specially trained in the art of healing, having superior learning and knowledge, assured plaintiff that he could be restored to health. That the plaintiff believed him is easily imagined, for a much stronger or more learned man would readily have believed the same thing. The doctor with his skill and ability should be able to approximate to the truth when giving his opinion as to what can be done with injuries of one year's standing, and he should always be able to speak with certainty before he undertakes to assert positively that a cure can be effected. If he cannot speak with certainty let him express a doubt. If he speaks without any knowledge of the truth or falsity of a statement that he can cure, and does not believe the state-

[1] Homer *v.* Perkins, 124 Mass., 431; Hedin *v.* Minneapolis Medical and Surgical Institute, 62 Minn.. 146; Conlan *v.* Roemer, 52 N. J. L., 53.

ment true or if he has no knowledge of the truth or falsity of such statement, but represents it as true of his own knowledge, it is to be inferred that he intends to deceive. The deception being designed in either case, and injury having followed from reliance upon the statements, an action for deceit will lie."

To recover damages from a Christian Science healer because of deceit in stating that he could and would cure an intending patient, whom he failed to benefit, plaintiff must show not only that the statement was false, but that it was made with fraudulent intent. And the fact that such healer did not believe he could induce God to heal a person sick with appendicitis when he stated to her that he could and would heal her, cannot be found by the jury merely because they believe that the statement that a cure could be effected without material aid was untrue.[1]

16. LIABILITY FOR MAKING WRONGFUL CERTIFICATE OF INSANITY

One of the important duties a physician is called upon to perform is that of testifying on the question of the commitment of an alleged lunatic to an asylum. The proceedings for such commitment are detailed in the statutes of the several States. It is conceded that if a certificate is correct, it is a complete bar to a civil action for damages. Likewise if physicians who have certified to the insanity of a person have not made the inquiry and examination which the statute requires, or if their evidence and certificate in any respect or form or substance is not sufficient to justify a commitment, the municipal officers should not commit, and if they do it is their fault and not

[1] Spead *v.* Tomlinson, 73 N. H., 46; 59 Atl., 376.

that of the physicians, provided they have stated facts and opinions truly and have acted with due professional care and skill. In such an action the falsehood, and not the insufficiency of the certificate, is the ground of action against the certifying physicians. Without statutory provisions to that effect there cannot be a civil action for damages against a physician based upon the insufficiency of the methods which he pursued in reaching and certifying a correct conclusion. Moreover the burden of proof is upon the plaintiff to show that she was sane at the time the certificate of insanity was given.[1] The author can do no better in this connection than to quote somewhat freely from the charge to the jury made by Crompton, J., in the interesting case of Hall *v.* Semple: "Take me as saying to you in point of law," says that able judge, "that if a medical man assumes, under this statute"—referring to an English statute similar to our statutes—"the duty of signing such a certificate, without making and by reason of his not making a due and proper examination, which a medical man under such circumstances ought to make and is called on to make, not in the exercise of the extremest possible care, but in the exercise of ordinary care, so that he is guilty of culpable negligence, and damage ensue, then, that an action will lie, although there has been no spiteful or improper motive and though the certificate is not false to his knowledge.

"The true ground of plaintiff's complaint is the negligence of the defendant and the want of due care in the discharge of the duty thrown upon him, and I think if a person assumes the duty of a medical man, under this statute, and signs a certificate of insanity which is untrue, without making the proper examina-

[1] Pennell *v.* Cumming, 75 Me., 163.

tion and inquiries which the circumstances of the case would require from a medical man using proper skill in such a matter, if he states that which is untrue and damage ensues to the party thereby, he is liable to an action, and it is to that I desire to call your particular attention. It is not that a medical man is bound to form a right judgment, so as to be liable to an action if he does not. There are cases of insanity which are very difficult to deal with or to understand. But what he is required to do is to make an examination and if necessary to make such inquiries as may be required. It would be unjust if a man were to be visited in cases of this kind; with consequences arising from mere error of judgment or mistake in fact.

"There must be, to make him liable, negligence in the discharge of those proper duties which it must be taken he has assumed in undertaking to sign the certificate of insanity, and if you are satisfied that there has been negligence, with reference to these matters, culpable negligence, as I have described it, then he is liable. Now I cannot help thinking that in a matter of this kind, which is not like a mere preliminary inquiry before a magistrate, but a proceeding upon which a man is to be at once confined to imprisonment as a lunatic, very considerable care is necessary. One can hardly say precisely what that degree of care may be. It is said that one may be satisfied with a quicker examination than another. We, for instance, would take a long time, before we should be able to form a judgment in a matter of this kind. A person experienced in such matters might decide more quickly, while an ordinary medical practitioner might require a longer time. We take it as clear, however, that considerable care ought to be used."[1] The principles

[1] Hall *v.* Semple, Foster and Finlason's Reports.

here laid down have been adopted by the courts in this country.[1] The United States Statutes provide that "A physician who knowingly makes any false certificate as to the sanity or insanity of any person shall upon conviction thereof be fined not more than five hundred dollars or imprisoned not more than three years or both." In Massachusetts "a physician who shall unlawfully or improperly conspire with a person to commit to an insane asylum or hospital in this Commonwealth a person who is not insane shall be punished by fine or imprisonment at the discretion of the court." Alienists are not liable for malpractice in issuing a certificate of insanity where they are guilty of nothing more than an error of judgment.[2] Actions brought against physicians for their alleged negligence or misconduct in certifying to the insanity of persons, whom they have been appointed to examine, are governed in general by the same rules that apply to actions for malpractice. Where a statute authorizes the commitment of a patient to an insane asylum upon a certificate of a committee of physicians appointed to examine him as to his sanity, a civil action for damages, based upon the insufficiency of the methods used by such physicians in reaching and certifying their conclusions, will not lie against them at common law. Such an action must be based upon the falsity of the certificate and not upon the insufficiency of the examination. In such an action the burden of proof is upon the plaintiff in respect to the averment and claim that he was then sane.[3]

[1] Williams *v.* Le Bar, 141 Pa., 149; Ayers *v.* Russell, 50 Hun. (N. Y.), 282; Niven *v.* Boland, 177 Mass., 11.

[2] Warner *v.* Packer, 139 App. Div., 207.

[3] Pennell *v.* Cummings, 75 Me., 163.

17. LIABILITY OF SURGEON FOR ACTS OF ASSISTANTS

The contract of a surgeon undertaking to perform an operation does not imply liability for mistakes in care, dressings, and treatments given by the attendants in a general hospital during convalescence after the operation is finished.[1] Thus it has been held that a physician is not liable for the negligence of nurses in a hospital where the patient is placed over whom he has no control,[2] and in Prerionowsky *v.* Freeman, 4 Fost. and F., 977, 800, Cockburn, Ch. J., remarked upon the practice (there proven) of surgeons to leave their patients in various details to the hospital nurses, that such practice was "indispensable," and the operating surgeon was not liable for their negligence. So these hospital attendants, known as "internes" (usually young physicians), are furnished at the general hospital to attend to the ordinary work of dressing and treating the wound (left by the operation) on the way to recovery; and the mere undertaking of the surgeon to operate, under call or engagement therefor, cannot, as we believe, imply his further personal undertaking for the ordinary details of after-treatment, to make the doctrine of respondent superior, applicable, to charge him for fault or negligence on the part of such hospital attendants, neither known nor discoverable by the surgeon in exercise of care and skill throughout his engagement. No doubt is entertainable, however, that the professional undertaking in the case at bar extended as well to the subsequent visits, observations, and personal treatment in evidence with the attendant obligation for the exercise of skill and care therein.

[1] Harris *v.* Fall, 177 Fed., 79; Baker *v.* Wentworth, 155 Mass., 338; 29 N. E., 589; Reynolds *v.* Smith (Iowa), 127 N. W., 192.

[2] Baker *v.* Wentworth, 155 Mass., 338.

18. LIABILITY FOR NEGLIGENCE OF PARTNER

In case two or more surgeons are associated together in practice as partners all are liable for malpractice by any member of the firm.[1] Thus if co-partners practising medicine and surgery are employed to set a broken leg, and one does his work skilfully and the other performs his duties negligently and unskilfully, causing injury, the firm will be liable.

19. LIABILITY FOR NEGLIGENCE OF SUBSTITUTE

A physician or surgeon is not liable for the negligence of another practitioner whom he recommends or sends in his place when he is unable to attend the patient, and whose services are continued under an independent contract, since no relation of agency or employment exists between the physicians.[2] Thus a surgeon who on being called to treat a patient informed him that he would be absent for two weeks and that another surgeon named would attend to his cases in his absence, will not be responsible for the latter's negligence or want of skill in treating the patient during such absence where there is no business relation between the two.[3]

20. LIABILITY FOR TAKING UNPROFESSIONAL UNMARRIED MAN INTO LYING-IN CHAMBER

Where a physician takes an unprofessional unmarried man with him to attend a case of confinement, where

[1] Haase *v.* Morton, 138 Iowa, 205; Hyrne *v.* Erwin, 27 S. E., 226; Whittaker *v.* Collins, 34 Minn., 299.

[2] Keller *v.* Lewis, 65 Ark., 578; 47 S. W., 755; Hitchcock *v.* Burgett, 38 Mich., 501; Myers *v.* Holborn, 58 N. J. L., 193; 33 Atl., 389.

[3] Keller *v.* Lewis, 65 Ark., 578.

there is no emergency requiring the latter's presence, both are liable in damages; and it makes no difference that the patient or husband supposed at the time that the intruder was a medical man, and therefore submitted to his presence.[1]

21. LIABILITY FOR INJURY TO ATTENDANT

A physician may be liable in damages for injuries from poison to one voluntarily assisting in caring for a wound, if knowing of infectious poison in the wound, he assures the attendant that there is no danger, although he is ignorant of a slight abrasion on the attendant's hands, in the absence of which the danger would not exist.[2]

22. EFFECT OF CONTRIBUTORY NEGLIGENCE OF PATIENT

(*a*) **In General.**—The law of contributory negligence as applied to cases of malpractice is slightly different in its operation than that in other cases of negligence. In ordinary cases, contributory negligence of a plaintiff to have a controlling effect must operate as an efficient cause of the injury complained of. It must have a casual connection with the act complained of. In actions of malpractice, an act of neglect on the part of the patient may occur concomitantly with the acts of neglect on the part of the physician, but not previously thereto. It may also occur subsequent to the negligence of the physician or surgeon. Whenever the negligence of the patient occurs subsequent to the negligence of the physician or surgeon, and

[1] De May *v.* Roberts, 46 Mich., 160.
[2] Edwards *v.* Lamb, 60 N. H., 599; 45 Atl., 480.

contributes substantially to the injury of which the patient suffers, then it may be shown, not strictly as a defence, nor for the purpose of destroying his right, but by way of mitigation of damages.[1]

In Ohio[2] it has been held that if his patient neglects to obey the reasonable instructions of the surgeon and thereby contributes to the injury complained of, he cannot recover for such injury. In Missouri[3] the rule in such cases seems to be that if the plaintiff substantially contributes to the injury by his improper or negligent conduct he cannot recover; but if the injury was occasioned by the improper or negligent conduct of the defendant and the plaintiff did not substantially contribute to produce it then the latter would be entitled to the verdict.

To entitle a patient to recover he must not have contributed to his injury in any degree.[4]

Neither can the patient recover when by his own acts he has rendered it impossible to determine whether the suffering and pain complained of was caused by his own negligence. For example, where by his own voluntary act he leaves the hospital before he ought to do so and makes it impossible to tell whether or not he would have been cured had he remained.[5]

[1] *Illinois*—Morris *v.* Despain, 104 Ill. App., 452. *Missouri*—Sanderson *v.* Holland, 39 Mo. App., 233. *New York*—Du Bois *v.* Decker, 130 N. Y., 325; 29 N. E., 313. *North Carolina*—McCracken *v.* Smathers, 122 N. C., 799; 29 S. E., 354. *Oregon*—Beadle *v.* Paine, 46 Oregon, 424; 80 Pac., 903. *Vermont*—Wilmot *v.* Howard, 39 Vt., 447. *West Virginia*—Lawson *v.* Conaway, 37 W. Va., 159.

[2] Geiselman *v.* Scott, 25 Ohio St., 86.

[3] West *v.* Martin, 31 Mo., 375.

[4] *Illinois*—Harring *v.* Spicer, 92 Ill. App., 449. *Indiana*—Lower *v.* Franks, 115 Ind., 334. *Massachusetts*—Hibbard *v.* Thompson, 109 Mass., 286. *Michigan*—Hitchcock *v.* Burgett, 38 Mich., 501. *Minnesota*—Chamberlain *v.* Porter, 9 Minn., 260. *Missouri*—West *v.* Martin, 31 Mo., 375. *New York*—Becker *v.* Janinski, 27 Abb. N. C., 45. *Ohio*—Geiselman *v.* Scott, 25 Ohio St., 86. *Pennsylvania*—Reber *v.* Herring, 115 Pa., 599.

[5] Richards *v.* Willard, 176 Pa., 181.

Or, "for instance, suppose a man fractures the bones in his leg below the knee, and calls a surgeon to treat the injuries, and the surgeon negligently fails to reduce one of the fractures, but in all other respects gives proper treatment, and the patient, in disobedience to the directions of the surgeon, negligently removes the bandages used as a part of the proper treatment by the surgeon, or is otherwise guilty of contributory negligence, and such combined negligence of the surgeon and patient unite in producing a shortness and stiffness of the leg, for which injuries an action is brought against the surgeon—can the patient recover? The patient is certainly not responsible in such a case for the original negligence of the surgeon in failing to properly reduce the fractures, but this negligence of the surgeon unites with the subsequent contributory negligence of the patient in causing the shortness and stiffness of the leg." Hence the patient has no cause of action against the surgeon.[1]

(*b*) **Failure of Patient to Obey Instructions.**—The most common form of contributory negligence is where the patient disobeys the instructions given him by his physician or surgeon, it being the duty of a patient to co-operate with his physician and obey all necessary instructions.[2] So if a surgeon tells his patient to visit him again as soon as he feels any pain, and though he felt pain for a week he did not return according to his instructions, the surgeon is exonerated for the resulting injury.[3]

Likewise, if a patient who is directed by his physician to observe absolute rest as a part of the treat-

[1] Young *v.* Mason, 8 Ind. App., 264; 35 N. E., 521.

[2] Jones *v.* Angell, 95 Ind., 376; Stover *v.* Bluehill, 51 Me., 439; Becker *v.* Janinski, 27 Abb. N. C., 45; Geiselman *v.* Scott, 25 Ohio St., 86; McCandless *v.* McWha, 22 Pa., 261.

[3] Jones *v.* Angell, 95 Ind., 376.

ment of an injured foot negligently fails to observe such direction, or purposely disobeys the same, he cannot recover if such disobedience proximately contributes to the injury of which he complains.[1] The information given to a patient concerning his malady must be considered in determining whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence.[2]

(*c*) **Where Patient is Delirious.**—If a patient is delirious and cannot be made to understand the proposed treatment, the surgeon must co-operate with the patient's immediate family, and if the latter refuse to allow the treatment or operation the surgeon is exonerated.[3]

(*d*) **Failure to Secure Assistants.**—If a physician requests the employment of another physician for consultation and to assist in administration of an anesthetic, and the patient refuses or neglects to secure him, the physician will not be liable for the permanent injury resulting when such assistance would have rendered the injury only temporary.[4] But the injured person is not bound to seek aid from other physicians to mitigate the consequences of the mistake of the attending physician.[5]

(*e*) **Burden of Proving Contributory Negligence.**—The burden of proving the contributory negligence of a patient is governed by the same rules as apply to other cases of negligence. The burden is on the plaintiff to show his freedom from negligence contributing to the result complained of.[6] The fact that

[1] Geiselman *v.* Scott, 25 Ohio St., 86.
[2] Ibid.
[3] Littlejohn *v.* Abogart, 95 Ill. App., 605.
[4] Haering *v.* Spicer, 92 Ill. App., 449.
[5] Chamberlin *v.* Morgan, 68 Pa., 168.
[6] Gramm *v.* Boener, 56 Ind., 497; Whitesell *v.* Hill, Iowa, 66; N. W., 894.

a patient is guilty of contributory negligence cannot be shown by the statements of one who had no personal knowledge of it.[1]

23. LIABILITY OF HOSPITALS FOR NEGLIGENCE OF SERVANTS

The courts have made a distinction between the liability of private and public charitable hospitals for damages for malpractice, holding the former liable in damages for the negligence of its servants, while the latter are only held liable to their patients for the failure to exercise due care in the selection of its agents. The reason for this distinction is that the latter institutions have no capital stock, no provisions for making dividends or profits, and whatever they may receive from any source they hold in trust to be devoted to the object of sustaining the hospital and increasing its benefits to the public, by extending or improving its accommodations, and diminishing its expenses. Their funds are derived mainly from public and private charity; their affairs are conducted for a great public purpose, that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will enure to their own benefit, and without any right to receive such compensation.[2]

24. ACTION FOR MALPRACTICE

(*a*) **How to Defend a Malpractice Suit.**—Where a medical man knows that he has performed his whole

[1] Hitchcock *v.* Burgett, 38 Mich., 501.
[2] McDonald *v.* Massachusetts General Hospital, 120 Mass., 432.

duty according to the best of his skill and knowledge, and according to the most approved teachings of his particular system, and he is unfortunate enough to become the defendant in a malpractice suit, he should never compromise or settle, for he owes it to himself and to his profession to vindicate himself before the world. He should employ at once the very best lawyer and put him in full possession of *all* the facts in his case; the withholding of such information has lost many a case, for it is just as impossible for an attorney to prepare his case when he has only been given part of the facts, or when the facts given are highly colored, as it would be for a physician correctly to diagnosticate a case when the patient tells him only a part of his pains and troubles and his history. Having done this be sure to have for your witnesses, physicians who command the respect of both professions, men who are both honest and learned, for many a case has been lost by the sorry spectacle some witnesses make in the hands of a skilful cross-examiner. After securing your witnesses see to it that your attorney has ample opportunity to ascertain in detail what their testimony will be.

(*b*) **Nature of Remedy.**—Where a physician or surgeon is employed to treat a patient without any express contract defining the character and the extent of his duty and undertaking, either an action of assumpsit or case may be maintained for the breach of the implied contract arising from such employment caused by unskilful, negligent, and improper treatment of the patient.[1] When the action is in tort, case is the proper remedy.[2] But when founded upon an express promise on the part of the physician the action is in

[1] Kuhn *v.* Brownfield, 34 W. Va., 252, 12 S. E., 519.
[2] Mullin *v.* Flanders, 73 Vt., 95, 50 Atl., 816.

contract and not in tort.[1] Where an operation is performed maliciously, no recovery in trespass can be had if the patient consented.[2]

(*c*) **Who May Recover Damages for Malpractice.**—A physician or surgeon is liable for damages caused to a patient by a failure to perform his contract.[3] When a married woman suffers injuries through the negligence of a physician or surgeon the husband may recover damages for the loss of the wife's society and services, and for his disbursements. Likewise, when a child is injured by the wrongful act or omission of a physician or surgeon, the father, or any other person standing in loco parentis, may maintain an action against the wrongdoer to recover for the resulting loss of service and incidental expenditures. In cases where the cause of action is made to survive the injured party by statute, the statute usually provides by whom the suit shall be brought and prosecuted. And when a servant is injured by the malpractice of a physician his master may recover for loss of services.[4]

(*d*) **When Suit Must be Commenced.**—The time in which a malpractice suit must be brought varies according to the statutes of limitations in force in the different States, ranging all the way from one year up to five years. The bothersome question is, when does the statute begin to run? The right of action accrues and the statute begins to run at the time the injury is received, and not from the time the damage is developed.[5] An interesting case in this relation is

[1] Burns *v.* Barenfield, 84 Ind., 43.
[2] Cadwell *v.* Farrell, 28 Ill., 438.
[3] Small *v.* Howard, 128 Mass., 131; Pike *v.* Honsinger, 155 N. Y., 203.
[4] Cross *v.* Guthey, 2 Root (Conn.), 90.
[5] Fadden *v.* Satterlee, 43 Fed. Rep., 568; Coady *v.* Reins, 1 Mont., 424; McArthur *v.* Bowers, 72 Ohio St., 656.

that of Gillette *v.* Tucker, 67 Ohio St., where the surgeon employed to operate upon a patient for what he pronounced to be appendicitis neglected or carelessly forgot to remove from the abdominal cavity a sponge which he had placed therein, and closed the incision, with the sponge remaining therein, and this condition continued during his entire professional relation to the case, and was present when he retired from the case. The supreme court held that the statute of limitations did not commence to run against a right to sue for malpractice until the case has been abandoned or the professional relation otherwise terminated. This case is interesting not only because of the peculiar nature of the facts involved, but because the same court three years later overruled its decision in an unreported case.[1]

(*e*) **Survival of Action.**—At common law an action for an injury to the person caused by the want of skill or negligence of a physician or surgeon did not survive the death of either party, although it was based on contract.[2] The statutes of the several States have, however, changed the law in this respect, so that in case of death suit may be brought or continued by or against the personal representative.[3]

(*f*) **How Malpractice May be Proved.**—The burden of proof in malpractice cases is upon the party attempting to show lack of skill or want of care.[4] Whether a physician has attended skilfully or properly a particular case is a question on which the opinion of medical men of the same school may be received

[1] McArthur *v.* Bowers, 72 Ohio St., 656.

[2] Long *v.* Morrison, 14 Ind., 595; Wolf *v.* Wall, 40 Ohio St., 111; Wade *v.* Kalbfleisch, 58 N. Y., 282.

[3] Harris *v.* Fall, 177 Fed., 79; Tefft *v.* Wilcox, 6 Kan., 46.

[4] Chase *v.* Nelson, 39 Ill. App., 53; Robinson *v.* Campbell, 47 Iowa, 625; Winner *v.* Lathrop, 67 Hun. (N. Y.), 511.

in evidence,[1] and they may state whether or not in their opinion it was in conformity with the established mode of treatment,[2] or whether an amputation has been skilfully performed.[3]

Thus a physician may express an opinion that a limb was or was not as good as the average condition of such cases treated by skilful physicians.[4] But proof that a leg which has been set is shorter than the other does not of itself establish unskilful treatment,[5] neither does proof of the failure of a physician to effect a cure of a dislocated clavicle of itself show a want of care or skill in its treatment, where it appears that results are not satisfactory under any form of treatment, and there is no assurance that the bone will permanently remain in place.[6]

As was said by the court in an Illinois case: "Proof of a bad result or of a mishap is of itself evidence of negligence or lack of skill. The defendant is qualified to practise medicine and surgery, and the evidence of the experts in his profession show him competent and skilful. Before a recovery could be had against him it must be shown that his treatment was improper or negligent, not merely that he was mistaken or that his treatment resulted injuriously to the plaintiff. A physician or surgeon, or one who holds himself out as such, is only bound to exercise ordinary skill and care in the treatment of a given case, and in order to hold him liable it must be shown that he failed to exercise such skill and care.

[1] Hoener *v.* Koch, 84 Ill., 408; Mayo *v.* Wright, 63 Mich., 32; Heath *v.* Glisan, 3 Or., 67; Roberts *v.* Johnson, 58 N. Y., 613; Wright *v.* Hardy, 22 Wis., 348.

[2] Twombly *v.* Leach, 11 Cush. (Mass.), 405.

[3] Tullis *v.* Rankin, 6 N. Dak., 44; Olmsted *v.* Gere, 100 Pa., 127.

[4] Olmsted *v.* Gere, 100 Pa., 127.

[5] Piles *v.* Hughes, 10 Iowa, 579.

[6] Tomer *v.* Aiken, 126 Iowa, 114; 101 N. W., 769.

"The jury cannot draw the conclusion of unskilfulness from proof of what the result of the treatment was, but that the treatment was improper must be shown by evidence." The gist of the action in this case was that the physician was mistaken as to the existence of a rupture, and applied a truss which, it was alleged, caused an abscess.[1] It is not necessary that the opinion of a medical expert in a malpractice case should be asked upon any particular part of the treatment, but taking the whole treatment together he may be asked whether it "was proper or improper."[2] And a physician who has attended a patient under the care of a brother physician may testify as to what, so far as he could judge, had been the first physician's treatment; in what respects it differed from his own; what effect, so far as he could judge, it had upon the plaintiff, and whether or not he saw any evidence that the plaintiff had been injured by his treatment.[3] If a physician or surgeon is intoxicated when he performs a surgical operation, that fact may be shown as part of the res gestæ, where he is sued for malpractice.[4] The plaintiff in an action for malpractice has a right to show his injuries and scars to the jury, and as a matter of fact, generally takes advantage of the privilege. Thus it has been held that it was not error to permit the patient to exhibit his shoulder to the jury.[5] The plaintiff in an action for malpractice must fail upon a showing equally consistent with negligence, or with reasonable care on the part of the physician.[6]

[1] Sims *v.* Parker, 41 Ill. App., 284.
[2] Mayo *v.* Wright, 63 Mich., 32.
[3] Barber *v.* Merriam, 11 Allen (Mass.), 322.
[4] Robinson *v.* Pioche, 5 Cal., 461; Alger *v.* Lowell, 3 Allen (Mass.), 402.
[5] Hess *v.* Lowry, 122 Ind., 225.
[6] Farrell *v.* Haze, 157 Mich., 374.

(*g*) **Defences.**—(1) *In General.*—Besides the defences of contributory negligence on the part of the plaintiff, and the fact that he has waited too long before commencing his suit for malpractice, there are several other defences that may be set up. One is that perhaps a medical practitioner may protect himself from liability for unskilfulness by special contract with his patient that he shall not be so liable.[1] It is no defence to a suit for malpractice that the physician is practising in violation of law.[2]

(2) *Admission of Inadequate Skill.*—If a physician has informed his patient that he has not sufficient skill to treat his case the patient cannot complain of the lack of such skill when he knew it did not exist. Thus where upon the trial of a malpractice case it appeared by the testimony of one of the defendants, who were the attending physicians or surgeons, that after examination of the wound he immediately announced that it was of such a serious character that he did not regard himself as sufficiently experienced in surgery to properly treat the case, and that he advised the father of the plaintiff, an infant, to call in the service of a more experienced surgeon, and another doctor, who was also a party defendant, was called in to aid in the operation, it was held proper to charge the jury that the patient could not complain of the lack of skill, where the physician frankly informed him of his want of skill.[3]

(3) *Other Proximate Cause of Injury.*—Where there are two or more possible causes of an injury, for one or more of which the physician is not responsible, the patient, in order to recover, must show by evidence

[1] Nelson *v.* Harrington, 72 Wis., 591.
[2] Musser *v.* Chase, 72 Wis., 577.
[3] Lorenz *v.* Jackson, 88 Hun. (N. Y.), 200; Small *v.* Howard, 128 Mass., 130.

that the injury was wholly or partly the result of that cause which would render the defendant [the physician] liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other the plaintiff[1] cannot recover.

Thus where the evidence given in an action brought to recover damages for the death of a patient, caused by the alleged negligence of physicians, who, while performing an operation upon the deceased, administered chloroform to him, presents two possible causes of the intestate's death—one, the chloroform administered by the defendants, and the other, calcareous degeneration of the heart—a failure on the part of the plaintiff to show that death resulted, wholly or in part, from the chloroform, precludes a recovery by him.[2] Neither can a patient recover if no injury resulting from the act of the physician is shown.[3] Surgeons are not liable where death is caused by disease not produced by the operation.[4] In an action against him for malpractice a clairvoyant physician cannot be heard to charge the plaintiff's father with negligence because, with full knowledge of defendant's methods of diagnosis and prescription, he employed him to treat his son.[5]

(4) *Negligence of Assistant.*—And a surgeon is not relieved of the consequences of his own negligence because of the negligence of his assistant. Thus a surgeon who assists in removing his patient upon whom he has operated from the operating room to her private room in a hospital, although not in actual charge of her at that particular time, is bound to use

[1] Grant *v.* P. & N. Y. C. & R. Co., 133 N. Y., 657.
[2] Yaggle *v.* Allen, 24 App. Div. (N. Y.), 594.
[3] Craig *v.* Chambers, 17 Ohio St., 253.
[4] State *v.* Housekeeper, 70 Md., 162.
[5] Nelson *v.* Harrington, 72 Wis., 591.

reasonable care for her safety, and he will not be excused for his failure to do so because his assistant has been negligent.[1]

(5) *Judgment for Services as Bar to Malpractice Suit.*—Upon the subject whether or not a judgment rendered in a suit for fees in favor of a physician estops the patient from bringing an action for malpractice the decisions are much divided. In New York in the leading case of Gates *v.* Preston, 41 N. Y., 113, and in Bellinger *v.* Craigue, 31 Barb. 534, the affirmative was held, and such has been the uniform current of decision in that State.[2] New Jersey, Arkansas, and perhaps other States have followed the New York decisions.[3] Upon the other hand, Indiana, Ohio, Wisconsin, West Virginia, and perhaps other States have followed a contrary doctrine.[4]

The dividing line between the New York decisions and those of the States which have taken a contrary view is upon the fact whether the judgment obtained by the physician was a judgment by default; for all the cases concede that if the patient has appeared and defended the action on the ground of neglect or want of skill, the judgment against him is an estoppel, and he cannot bring his cross-action for malpractice. But when the judgment is by default and no defence has been made, the majority of cases would seem to hold that the question of malpractice was not involved, and that the patient has not impaired his right of action by neglecting or refusing to appear to the suit against him. Finding this

[1] Haase *v.* Morton & Morton, 138 Iowa, 205.

[2] Blair *v.* Bartlett, 75 N. Y., 150; Dunham *v.* Bower, 77 N. Y., 76.

[3] Ely *v.* Wilbur, 49 N. J. L., 685; Dale *v.* Donaldson Lumber Co., 48 Ark., 188.

[4] Goble *v.* Dillon, 86 Ind., 327; Sykes *v.* Bonner, 1 Cin. R., 464; Lawson *v.* Conaway, 37 W. Va.; Ressequie *v.* Byers, 52 Wis., 650.

contrariety of opinion in the courts of last resorts we can only say that it depends upon the State in which the physician happens to be practising whether he can set up his judgment for fees as a bar to a malpractice suit.

(*h*) **Right to a Physical Examination of the Plaintiff.** —Whether the defendant [the physician] has the right to compel the plaintiff [the patient] to submit to a physical examination has been the subject of much controversy. No such right existed at common law, but in a great many States it is now regulated by statute. In the absence of statute upon the subject the weight of authority seems to be that trial courts have the power to order the surgical examination by experts of a patient seeking a recovery for physical injuries; that the defendant has no absolute right to have an order made to that end and executed, but that the motion, therefore, is addressed to the sound discretion of the court; that the exercise of that discretion will be reviewed on appeal, and corrected in case of abuse; and that the examination should be ordered and had under the direction and control of the court whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to the plaintiff's life or health, and without the infliction of serious pain.[1] The power of the courts to this

[1] Ala. Great So. Ry. Co. *v.* Hill, 90 Ala., 71; Richmond & D. R. Co. *v.* Childress, 82 Ga., 719; Schroeder *v.* Chicago R. I. & P. R. Co., 47 Ia., 375; Atchison, T. & S. F. R. Co. *v.* Thul, 29 Kan., 466; Graves *v.* Battle Creek, 95 Mich., 266; Hatfield *v.* St. Paul & D. R. Co., 33 Minn., 130; Owens *v.* Kansas City, St. J. & C. B. R. Co., 95 Mo., 169; Stuart *v.* Havens, 17 Nebr., 211; Miami & M. Turnp. Co. *v.* Baily, 37 Ohio St., 104; International G. N. R. Co. *v.* Underwood, 64 Tex., 463; White *v.* Milwaukee City R. Co., 61 Wis., 536.

end is denied in Illinois in a very meager opinion of the supreme court, in which the subject is dismissed with the assertion that "the court had no power to make or enforce such an order."[1]

(*i*) **Who are Judges of Skill.**—The definition of what constitutes ordinary skill, care, and diligence is a question of law, but the application of the law to the facts is for the jury, so that the question whether or not there has been due care in the particular case is a mixed question of law and fact. Whether a physician in making a diagnosis uses ordinary care and skill is a question of fact for the jury,[2] and it is for the jury to say on the evidence whether the omission of certain treatment was or was not negligence,[3] and what treatment amounts to negligence under the rule of skill required.[4] Whether a surgeon after reducing a dislocation of the hip and discovering a tendency not to remain in place is justified in adopting a rude substitute for the regulation splint to keep it in place is a question for the jury.[5] But it has been held that juries should not be allowed to determine for themselves by inspection whether a physician's course of treatment has been improper,[6] and if the treatment is according to a recognized system of surgery the court and jury cannot undertake to determine whether that system is the best.[7] The determination of the question whether there has been a lack of due care and skill on the part of a surgeon in the performance of an operation, or not, is for the jury under appropriate instructions by the

[1] Parker *v.* Enslow, 102 Ill., 272.
[2] Harriott *v.* Plimpton, 166 Mass., 585.
[3] Carpenter *v.* Blake, 60 Barb., 488.
[4] Hewitt *v.* Eisenbart, 36 Nebr., 794.
[5] Vanhooser *v.* Berghoff, 90 Mo., 487.
[6] Carstens *v.* Hanselman, 61 Mich., 426.
[7] Williams *v.* Poppleton, 3 Or., 139.

court looking to the facts of the case, and the testimony of expert surgeons. Courts and juries must depend almost entirely in many cases upon the medical profession, for as has been well stated: "The question whether a surgical operation has been unskilfully performed or not is one of science, and is to be determined by the testimony of skilful surgeons as to their opinion, founded either wholly upon an examination of the parts operated upon or partly upon such examination, partly upon such information, and partly on facts conceded or proved at the trial; or partly on such examination and partly on facts conceded or proved at the trial."[1] Thus it has been held necessary to warrant a finding that a physician is guilty of malpractice, it has been held that there must be medical expert testimony to show it.[2] The damages for malpractice must all be recovered in a single action, and successive suits cannot be brought for damage subsequently accruing.[3]

(*j*) **Measure of Damages in Malpractice Suits.**— "The practice of surgery is indispensable to the community, and while damages should be paid for negligence and carelessness, surgeons should not be deterred from the pursuit of their profession by intemperate and extravagant verdicts."[4]

(1) COMPENSATORY DAMAGES. — The measure of damages in a malpractice case is determined by the amount in money which will give compensation to the party injured for the actual loss sustained.[5] Suffering also, which is produced in consequence of the acts

[1] McClelland's Civil Malpractice, 304.

[2] Wilkins' Admr. *v.* Brock and Rosselli, 81 Vt., 332.

[3] Howell *v.* Goodrich, 69 Ill., 556.

[4] Howard *v.* Grover, 28 Me., 97.

[5] Tefft *v.* Wilcox, 6 Kan., 46; Curtis *v.* Rochester & S. Ry., 20 Barb., 282; Sale *v.* Eichberg, 105 Tenn., 333; 59 S. W., 1020.

in question, may be a subject of compensation.[1] So also the loss of time,[2] and actual expenses incurred in consequence of the fault, want of skill or negligence of the physician. Regard is also to be had in such case to the character of the resulting injury, as to whether it be temporary or permanent in its consequences.[3] They are given for present and prospective damage, and may cover the actual pecuniary loss sustained; the indirect pecuniary loss; diminution of means of earning a living; deprivation of the services of the wage earner; loss of the services of wife or child.[4]

In addition, if the act was criminal, oppressive, or grossly negligent the jury may award exemplary damages by way of punishment.

Illustrations of Compensatory Damages.—In order to give some idea of what juries have considered a fair compensation for the loss actually sustained, we have set out the verdicts given in a number of malpractice cases involving a variety of injuries, and how the highest court in each State regarded them. In an action for alleged malpractice in the setting and treatment of a patient's arm the jury rendered a verdict for the plaintiff for $7000. The physician moved for a new trial, but the patient having consented to a reduction of the verdict to $5200 the motion was denied.[5] A verdict for $5583.33 for the plaintiff

[1] Lathrope *v.* Flood (Cal.), 63 Pac., 1007.

[2] Tefft *v.* Wilcox, 6 Kan. 46; McCracken *v.* Smathers, 122 N. C., 799; 29 S. E., 354; Jones *v.* Northmore, 46 Vt., 587.

[3] Indianapolis, etc., Ry. *v.* Gaston, 58 Ind., 224; Tefft *v.* Wilcox, 6 Kan., 46; Dorris *v.* Warford, 30 Ky. L. Rep., 963; 100 S. W., 312; Chamberlain *v.* Porter, 9 Minn., 260; Whalen *v.* St. Louis, etc., Ry., 60 Mo., 323; McCracken *v.* Smathers, 122 N. C., 799.

[4] *Recovery for malpractice may embrace prospective damages*, Howell *v.* Goodrich, 69 Ill., 556; Becker *v.* Janinski, 27 Abb. N. Cas., 45.

[5] Getchell *v.* Lindley, 24 Minn., 265.

in an action against a physician whom he employed to treat him for eczema and who injured him by the alleged negligence in applying *x*-rays to his hand, has been held not to be excessive.[1] The sum of $4500 has been held not to be such excessive damages as will warrant a new trial in a suit against a surgeon for malpractice, the result of gross ignorance and mismanagement, whereby the patient was made helpless for life.[2] "A verdict of $4000 for malpractice in negligently communicating a private disease by the use of infected instruments is excessive, and should be reduced to $2000 where the plaintiff was fully cured without permanent disability, and her losses were less than $200, the balance being due for pain and suffering, which must be limited to compensatory damages."[3] A verdict against a physician for $2025 for an alleged error in judgment in not removing more of a diseased limb was held excessive, where it was by no means certain that the removal of a larger portion would have been effectual.[4] A verdict for $5000 damages for malpractice in a case of confinement was held under the evidence to indicate passion and prejudice. The injury in this case was the alleged lack of proper care and skill in treating the injury, which was a separation of the pelvic bones.[5] A verdict of $2000 for the unwarranted abandonment of a confinement case has been held not to be excessive. A verdict of $3000 for an injury from malpractice resulting in much suffering, and finally in a difficult operation, in removing one of plaintiff's ovaries, impairing her health and genital function, has been

[1] Hales *v.* Raines, 130 S. W., 425.
[2] Kelsey *v.* Hay, 84 Ind., 189.
[3] Helland *v.* Bridenstine, 55 Wash., 470.
[4] Howard *v.* Grover, 28 Me., 97.
[5] Reynolds *v.* McManus, 139 Iowa, 242.

held not to be excessive.[1] A verdict for $2000 in a malpractice case has been held to be excessive and required to be reduced to $1200, where the circumstances of the case were as follows: A physician performed an operation January 16, 1905, and left gauze in the wound, which might properly have been allowed to remain about a week, but which was not removed until February 27 following. The wound healed within a few days thereafter, and the patient recovered immediately after a subsequent operation for hernia, showing that the suffering from melancholia, headache, and insomnia was due to the hernia rather than other conditions produced by leaving the gauze pad in the abdomen. And the evidence showed that it was exceedingly doubtful whether hernia was attributable to the delay in healing due to the gauze.[2] So an award of $3500 for leaving a sponge in the abdomen has been allowed to stand, where such negligence caused the intestines to ulcerate, creating a fistula which emitted fecal matter and noxious gases to serious impairment of the plaintiff's health and caused her sickness and mental anguish.[3]

An award of $1000 for negligence in the case of a broken leg, whereby it was shortened three-fourths of an inch, has been allowed to stand.[4] For the improper treatment of an eye the patient has been awarded $362.75 where the loss of sight in one eye resulted.[5] And for the improper and unsuccessful treatment of an arm which resulted in permanent disability $1000 has been held to be fair compensation.[6]

[1] Allen *v.* Voje (Wis.), 89 N. W., 924.

[2] Lathrope *v.* Flood (Cal.), 63 Pac., 1007; Reynolds *v.* Smith (Iowa), 127 N. W., 192.

[3] Samuels *v.* Willis, 133 Ky., 459.

[4] Hallam *v.* Means, 82 Ill., 379.

[5] McMurdock *v.* Kimberlin, 23 Mo. App., 523.

[6] Wood *v.* Clap, 4 Sneed (Tenn.), 65.

Mental suffering naturally attending, and incident to, physical pain, prolonged by the failure of a physician to discover the seat of a bodily injury, is a proper element of damages for the failure of a physician to discover a serious dislocation of a patient's shoulder and a fracture of an arm where there was a reasonable opportunity for examination and the dislocation and fracture could have been ascertained by the exercise of ordinary care.[1]

(2) NOMINAL DAMAGES.—Nominal damages is a trifling sum awarded when a breach of duty or an infraction of the plaintiff's right is shown, but no substantial loss is proved to have been sustained. Nominal damages are proper where lack of care and skill by the physician or surgeon is shown, but where it is impossible to distinguish between the consequences of the physical ailment for which the patient was being treated and those of the lack of professional skill and care.[2] Expediting the death of a patient by carelessness, inhuman treatment on the part of the attending physician, is not a mere technical injury, compensated for by nominal damages, but calls for compensatory and even punitive damages at the hands of the jury.[3]

(3) EXEMPLARY DAMAGES.—In an action for malpractice against a physician for non-fulfilment of contract in the treatment of a disease, and for gross negligence in the treatment of the same the plaintiff is entitled to vindictive as well as actual damages.[4]

Thus it has been held that exemplary damages were properly awarded in a case where the physician sued had attended a woman in childbirth and had,

[1] Manser *v.* Collins, 69 Kan., 290.
[2] Larson *v.* Chase, 47 Minn., 307; Becker *v.* Janinski, 27 Abb. N. C., 45.
[3] Gray *v.* Little, 126 N. C., 385.
[4] Cochran *v.* Miller, 13 Iowa, 128; Brooke *v.* Clarke, 57 Texas, 105.

immediately on the birth of the child and before its removal from bed, tied two ligatures and cut the umbilical cord, where the next morning it was found that one ligature had been tied so tightly around the child's penis that it resulted in a loss of nearly all the glands of that member.[1] The judge who wrote the opinion in the case commenting thus: "The criminal indifference of the physician to results was a fact which the jury were at liberty to infer from the gross mistake which he either made or permitted to be made, and the grievous injury which was liable to result and did result therefrom. If there was other evidence tending to negative any wrong intent or actual indifference on his part, still the existence or non-existence of such criminal indifference was a question of fact for the jury, and was rightly submitted to them. If the conduct of the physician as accoucheur was so grossly negligent as to raise the presumption of his criminal indifference to results, we very greatly doubt whether it would avail to exempt him from exemplary damages to show that he had no bad motive and that he acted otherwise in a manner tending to show that he was not at heart indifferent. Where the act is so grossly negligent as to raise the presumption of indifference, evidence that in other matters connected therewith he had shown due care, and that actual indifference would have been in fact, indifference to his own interest, should, we think, not be considered by the jury in fixing the amount of exemplary damages."[1]

(*k*) **New Trial or Review.**—*New Trial.*—In case the preponderance of the evidence against the verdict is so great that it is an abuse of discretion not to grant a new trial, and submit the case to another jury, as was said by

[1] Brooke *v.* Clarke, 57 Tex., 105.

Judge Mitchell: "It is not merely a sum of money, but also the reputation of the defendant as a physician and surgeon which is involved, and we do not think that he should stand condemned for all time as an incompetent upon the state of the evidence disclosed by the record, without at least submitting the question to one more jury of his countrymen."[1] A new trial on account of excessive damages, in a suit against a surgeon for malpractice, will only be granted where they are so excessive as to indicate that the jury acted from prejudice, partiality, or corruption, or were misled as to the proper measure of damages.[2]

Review.—The erroneous admission of evidence, and the giving of an erroneous instruction to the jury in a malpractice case is not a fatal error, where it is harmless or does not prejudice either party.[3] Where there is a fair conflict in the testimony of experts, and there is no such preponderance as to enable the court to say that the jury did not give to that kind of testimony due consideration, the verdict must stand.[4] Where, however, the evidence greatly preponderates against the verdict, the judgment will be reversed and a new trial granted.[5]

[1] Martin *v.* Courtney, 75 Minn., 256.
[2] Kelsey *v.* Hay, 84 Ind., 189.
[3] Whitesell *v.* Hill, 101 Iowa, 629.
[4] Getchell *v.* Lindley, 24 Minn., 265.
[5] Yaggle *v.* Allen, 24 App. Div. (N. Y.). 594.

CHAPTER VII

CRIMINAL LIABILITY OF PHYSICIANS AND SURGEONS

1. FOR UNAUTHORIZED PRACTICE OF MEDICINE

(*a*) **In General.**—Under all the statutes regulating the practice of medicine the gist of the offence consists in practising without having procured a license or without having registered. Hence the indictment must affirmatively aver the failure of the physician to comply with the regulations of the statute.[1] It need not allege that he has received any fee or reward for his services.[2]

It is necessary in a prosecution for practising without authority to state specifically the essential facts constituting the offence.[3]

The statutes of a great many of the States which have enacted laws regulating the practice of medicine and surgery prescribe a penalty for the violation of the law. The amount of the fine and the term of imprisonment being largely discretionary with the court, the statute fixing the minimum and maximum fine and sentence. Under these statutes it is immaterial how well qualified a person may be to practise medicine if he has not qualified according to the provisions of the State law upon that subject.

[1] State *v.* Fussell, 45 Ark., 65; State *v.* Hathaway, 106 Mo., 236; Jones *v.* State, 49 Nebr., 609; State *v.* Call, 121 N. C., 643; Derrick *v.* State, 34 Tex. Crim. Rep., 21.

[2] State *v.* Call, 121 N. C., 643.

[3] O'Connor *v.* State, 46 Nebr., 157; 64 N. W., 719; Denton *v.* State, 21 Nebr., 445; 32 N. W., 222.

(*b*) **Burden of Proof.**—The prosecution needs only to prove that defendant practised or held himself out as practising medicine, as alleged in the indictment. The defendant [the physician] must then rebut the State's proof by evidence that he did not do the acts testified to by the people's witness, or show that he is licensed and registered as the statute requires, or that he is within the exceptions of the statute.[1] If the defendant [the physician] claims an exemption from the provisions of the statute allowing persons to practise medicine for the reason that they have been in active practice before the passage of the act, the burden of proof is on him to show that he was engaged in practice at that time.[2]

(*c*) **Proof of License or Diploma.**—Where the license is conferred by the State the certificate may readily be produced and proved. In some jurisdictions a transcript of the record is expressly made prima facie evidence of its facts. Whenever a candidate is admitted to practise medicine and surgery by virtue of a diploma, the accused must show the authority of the institution to confer the degree, and also the regularity of the document, and that the bearer is the lawful possessor of such diploma, and that he has complied with preliminary requirements.[3]

2. FOR GROSS NEGLIGENCE OR LACK OF SKILL

The rule in the United States, and that is the only rule we have deemed it wise to consider in this work, as the more rules the more confusing the subject

[1] Benham *v.* State, 116 Ind., 112; People *v.* Fulda, 52 Hun. (N. Y.), 65; Raynor *v.* State, 62 Wis., 289.

[2] Morris *v.* State, 117 Ga., 1.

[3] Hunter *v.* Blount, 27 Ga., 76; Hill *v.* Boddie, 2 Stew. & P. Ala., 56.

becomes, is that a mere mistake of judgment by a physician in the selection and application of remedies or appliances causing death does not render him criminally liable.[1] The inadvertent infliction of a wound by a physician on a patient, resulting in death, does not render him guilty either of murder or manslaughter, where he used the instrument [surgeon's sound] commonly employed for like purposes, without evil intent or negligence.[2] A much more liberal rule on the question of the necessary skill of the physician to relieve him from criminal responsibility for results was adopted by a number of the early cases, it being held that if a person assumes to act as a physician and prescribes with an honest intention of curing the patient, the physician is not guilty of manslaughter or murder in the event of the patient's death in consequence of the treatment, no matter however ignorant of medical science, or the nature of the disease, or of the consequences of the treatment the physician may be;[3] and that to render a person causing the death of another by administering poison guilty of manslaughter, where he was ignorant of the poisonous character of the drug, it must appear that he was giving the drug with a wicked or evil purpose.[4] The later cases, however, seem to support the rule that an actual good intent and the expectation of good results by a physician in his treatment of a patient are not an absolute justification of his acts, however foolhardy they may have been if judged by an external standard; and if his act was the result of foolhardy presumption or gross negligence he is as responsible

[1] State *v.* Hardister, 38 Ark., 605.

[2] State *v.* Reynolds, 42 Kan., 322; 22 Pac., 410.

[3] State *v.* Schultz, 55 Iowa, 628; Com. *v.* Thompson, 6 Mass., 134; Rice *v.* State, 8 Mo., 561; Robbins *v.* State, 8 Ohio St., 138.

[4] Caywood *v.* Com., 7 Ky. Law Rep., 224.

for the result as though he had done unlawful acts for independent reasons. The condition of the individual's mind with regard to the consequences must be taken into consideration, as distinguished from mere knowledge of present or past circumstances from which others might be led to anticipate or apprehend a particular result from acts done.[1]

Thus upon the trial, under an indictment for manslaughter, of an irregular practitioner for causing the death of a patient by the application of coal oil with her consent, by covering her with flannels saturated with the oil for two or three days, the court said: "The defendant publicly practised as a physician, and being called to attend a sick woman, caused her with her consent to be kept in flannels saturated with coal oil for three days, more or less, by reason of which she died. He had made similar applications with favorable results in other cases, but in one of them the effect had been to blister and burn the flesh, as in the present case. His duty was not enhanced by an express or implied contract, but he was bound at his peril to do no grossly reckless act when he intermeddled with the person of another in the absence of any emergency or other exceptional circumstances. The claim is made that to constitute manslaughter the killing must have been the consequence of some unlawful act. If this means that the killing must be the consequence of an act which is unlawful for independent reasons, apart from its likelihood to kill, it is wrong. Such may once have been the law, but for a long time it has been just as fully and latterly, we may add, much more willingly recognized that a man may commit murder or manslaughter by doing otherwise lawful acts recklessly, just as he may by

[1] Com. *v.* Pierce, 138 Mass., 165.

doing acts unlawful for independent reasons, from which death accidentally ensues. But recklessness in the moral sense means a certain state of consciousness with reference to the consequences of an overt act. It is undoubtedly true, as a general proposition, that a man's liability for his acts is determined by their tendency under all the circumstances known to him, and not by their tendency under all the circumstances actually affecting the result, whether known or unknown; but he cannot escape on the ground that he has had less than common experience.

"Common experience is necessary to a man of ordinary prudence, and a man assuming to act as the defendant did must have it at his peril. Here he knew he was using coal oil. More than that, he saw from day to day how it worked. It was applied as the result of foolhardy presumption or gross negligence. When he applied the coal oil to the person of the deceased in a reckless way, or, in other words, seriously and unreasonably endangered her life according to common experience, he did an act which his patient could not justify by her consent, and which therefore was an assault notwithstanding that consent, and he is therefore guilty of manslaughter."[1]

A physician may be charged with manslaughter by causing the death of a sick child by advising a diet which results in its starvation, under a statute which treats all persons concerned in the commission of an offence as principals, although it was the mother of the child who actually withheld the food from it in the absence of the accused.[2]

Likewise a physician is held criminally liable for the results of gross ignorance of the art he assumes

[1] Commonwealth *v.* Pierce, 138 Mass., 165.
[2] State *v.* McFadden (Wash.), 93 Pac., 414.

to practise, or of gross ignorance in the selection or application of remedies, and of gross negligence with reference thereto.[1] Under this rule, where poison is knowingly administered with intent to accomplish some unlawful purpose and death ensues, it is murder though the death was not intended; but manslaughter only, if it was heedlessly administered with no unlawful purpose.[2] It is the duty of a physician, neglect of which may render him criminally responsible for fatal results, to direct as to sanitary conditions surrounding the patient, and the means and manner of taking the medicines, and whatever other applications and operations are necessary to restoration of health.[3] The consent of a patient is not a defence in a prosecution against a surgeon causing his death, unless the operation performed by the surgeon was done with due care and skill; consent is no excuse for recklessness or want of skill. A surgeon cannot be convicted of the crime of manslaughter for performing an operation upon the deceased without his consent if the operation did not result in his death.[4] The criminal liability of a physician for the death of his patient, brought about by his gross negligence, carelessness, or ignorance, may be established under an indictment or information predicated upon general statutes defining manslaughter.[5] A statutory provision that if a physician under certain conditions shall, without design to effect death, administer any poison, drug, or medicine, or do any other act to another person which shall produce the latter's death, he shall be deemed guilty of manslaughter, furnishes the rule of action in the

[1] State *v.* Hardister, 38 Ark., 605; Hampton *v.* State (Fla.), 39 So., 421.
[2] State *v.* Wagner, 78 Mo., 644.
[3] State *v.* Power, 24 Wash., 34; 63 Pac., 1112.
[4] State *v.* Gile, 8 Wash., 12; 35 Pac., 417.
[5] Hampton *v.* State (Fla.), 39 So., 421.

enumerated cases only, and does not prevent holding a physician criminally liable for the unintended death of his patient, brought about by his gross negligence or ignorance, in cases other than the enumerated ones.[1] A person's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the law of the land.[2]

Illustrations of Gross Negligence and Lack of Skill.—Under this head I have chosen to take the liberty to set out with more or less detail the facts in a few of the most interesting and most glaring cases of dense ignorance and gross negligence that have been reported. The first case is the one most familiarly known among the legal profession, that of Commonwealth *v.* Thompson, the defendant being Dr. Thompson, founder of the Thompsonian system of medicine, and the prosecution was for murder. "On the trial it appeared in evidence that the prisoner, some time in the preceding December, came into Beverly, where the deceased then lived, announced himself as a physician, and professed ability to cure all fevers, whether black, gray, green, or yellow; declaring that the country was much imposed upon by physicians, who were all wrong, if he was right. He possessed several drugs, which he used as medicine, and to which he gave singular names. One he called coffee; another, well-my-gristle; and a third, ramcats. He had several patients in Beverly and in Salem previously to Monday, January 2, when the deceased, having been for several days confined to his house by a cold, requested that the prisoner might be sent for as a physician.

"He accordingly came and ordered a large fire to be kindled to heat the room. He then placed the feet

[1] Hampton *v.* State (Fla.), 39 So., 421.
[2] Reynolds *v.* United States, 98 U. S., 143.

of the deceased, with his shoes off, on a stove of hot coals and wrapped him in a thick blanket covering his head. In this situation he gave him a powder in water which immediately puked him. Three minutes after he repeated the dose, which in about two minutes operated violently. He again repeated the dose, which in a short time operated with more violence. These doses were all given within the space of half an hour, the patient in the meantime drinking copiously of a warm decoction, called by the prisoner his coffee. The deceased, after puking, in which he brought up phlegm but no food, was ordered to a warm bed, where he lay in a profuse sweat all night. Tuesday morning the deceased left his bed and appeared to be comfortable, complaining only of debility; and in the afternoon he was visited by the prisoner, who administered two more of his emetic powders in succession, which puked the deceased, who, during the operation, drank of the prisoner's coffee and complained of much distress. On Wednesday morning the prisoner came, and, after causing the face and hands of the deceased to be washed with rum, ordered him to walk in the air, which he did for about fifteen minutes. In the afternoon the prisoner gave him two more of his emetic powders, with draughts of his coffee. On Thursday the deceased appeared to be comfortable, but complained of great debility. In the afternoon the prisoner caused him to be sweated, by placing him, with another patient, over an iron pan, with vinegar heated by hot stones put into the vinegar, covering them at the same time with blankets. On Friday and Saturday the prisoner did not visit the deceased, who appeared to be comfortable, although complaining of increased debility. On Sunday morning, the debility increasing, the prisoner was sent for,

and came in the afternoon when he administered another of his emetic powders with his coffee, which puked the deceased, causing him much distress. On Monday he appeared comfortable, but with increasing weakness, until the evening, when the prisoner visited him and administered another of his emetic powders, and in about twenty minutes repeated the dose. This last dose did not operate. The prisoner then administered pearlash mixed with water, and afterward repeated his emetic potions. The deceased appeared to be in great distress and said that he was dying. The prisoner then asked him how far the medicine had got down. The deceased laying his hand on his breast, answered here, on which the prisoner observed that the medicine would soon get down and unscrew his navel, meaning, as was supposed by the hearers, that it would operate as a cathartic. Between 9 and 10 o'clock in the evening the deceased lost his reason and was seized with convulsion fits, two men being required to hold him in bed. After he was thus seized with convulsions the prisoner got down his throat one or two doses of his emetic powders, and remarked to the father of the deceased that his son had got the hyps like the devil, but that his medicine would fetch him down; meaning, as the witness understood, would compose him. The next morning the regular physicians of the town were sent for, but the patient was so completely exhausted that no relief could be given. The convulsions and loss of reason continued, with some intervals, until Tuesday evening, when the deceased expired." The "coffee" proved to be a decoction of marsh rosemary and the bark of the bayberry bush; the powder was Indian tobacco or Lobelia inflata. The court in this extraordinary case laid down the law as follows: "The

death of a man, killed by voluntarily following a medical prescription, cannot be adjudged a felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge or probable information of the fatal tendency of the prescription that it may be reasonably presumed by the jury to be the effect of obstinate, wilful rashness at the least, and not of an honest intention and expectation to cure."

The case of Rice *v.* State is much like the preceding. The defendant in this case was also a botanical physician, and administered lobelia to a patient, who was pregnant and lacked about six weeks of time when she expected to be confined, for the purpose of curing her of "sciatica," from the effects of which a miscarriage was brought on, resulting in the patient's death. In delivering the opinion, the court said that "if a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed or the nature of the disease, or both, the patient died in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm." Thus applying the old rule and the same one used in Com. *v.* Thompson.[1]

Another case in this relation is that of State *v.*

[1] Rice *v.* State, 8 Mo., 561.

Schulz, which arose in Iowa. Schulz treated a sick woman by acupuncture and an irritating oil, according to the system of Herr Baunscheidt, who having been much benefited by the biting of small insects, sought to give the world, for a consideration, a simulacrum of his experience. Defendant admitted that he did not know the composition of the oil, that being Baunscheidt's secret. The patient died. Schulz claimed that if he had not been interfered with he could have helped her, and produced twenty-three witnesses to testify that Baunscheidtismus, as administered by him, had benefited them. Schulz was not held guilty by the higher court, who following the cases of Thompson and Rice, held that the interests of society will be subserved by holding a physician civilly liable in damages for the consequences of his ignorance without imposing upon him criminally liabilities when he acted with good motives and honest intentions.[1]

It has been held that where a physician, attending a female sick with bilious fever, and five months advanced in pregnancy, gave her no strong medicine, or did any act to bring about a miscarriage, and she was taken in labor, which proved ineffectual until the fetus was removed by force, and she afterward died from puerperal fever, not induced by anything done or omitted to be done by the physician, a conviction of him for manslaughter cannot be sustained. The court in considering the criminal responsibility of the accused said: "He may not have acted with either the best judgment or even the ordinary skill. But no unprejudiced person can read the evidence without being convinced that he acted with good motives, and the evidence wholly fails to show that the puerperal fever, of which the patient died, was

[1] State *v.* Schulz, 55 Iowa, 628.

caused by anything done or omitted to be done by the accused. If physicians and surgeons can be convicted of manslaughter and sent to the penitentiary upon such evidence as this record contains, there would be witnessed a frightful devastation in their ranks."[1]

In the case of State *v.* Hardister and Brown, the facts as set out in the indictment were substantially these: That the accused held himself out as a physician and obstetrician, and that he was called on a certain day to attend a lady who was about to be confined, and administered to her, while in the pains of childbirth, an unnecessarily large quantity of morphine, by reason of which the pains were retarded; that he then administered to her large and excessive quantities of fluid extract of ergot, by reason of which the patient was thrown into convulsions, and thereupon he bled the patient in the arm; that he then carelessly attempted to deliver the child by the use of forceps, by repeatedly introducing them without due caution, causing inflammation and fever; that he then carelessly administered large and excessive quantities of chloroform, and then without due care and circumspection, with a pocket-knife, did cut, puncture, and wound the said quick child in the head, thereby killing the child; that he then inserted his fingers into the mouth of the child and forced its head out of the mouth of the vagina, and then tied a rope around the neck of the child and, without due caution, pulled and delivered the child by force and violence, and that without delivering the afterbirth he abandoned the patient, who died from the effects in a few days. It is refreshing to say, however, that in this case the supreme court held that when

[1] Honnard *v.* State, 77 Ill., 481.

death is caused by gross ignorance in the selection or application of remedies, by one grossly ignorant of the art he assumes to practise, he is criminally liable.[1]

3. FOR THE PROCUREMENT OF ABORTIONS

(*a*) **Abortion Defined.**—Abortion is the act of miscarrying or producing young before the actual time and before the fetus is perfectly formed; and to cause or procure an abortion is to cause or procure this premature bringing forth of the fetus.[2] *Miscarriage* and *abortion*, in their legal and popular sense, are generally held to be synonymous.[3] There are also cases where the terms "miscarriage" and "abortion" were not held to be synonymous.[4] *Feticide*[5] is also sometimes used as synonymous with criminal abortion.

(*b*) **Abortion as a Crime.**—This is to be found only in modern treatises and in modern statutes. No trace of it is to be found in the ancient common law writers.[6] In many of the States the procurement of an abortion with the consent of the mother before the child became quick was not at common law considered a criminal act. In other States it has been held that it is not the murder of the living child which constitutes the offence of procuring an abortion, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct

[1] State *v.* Hardister, 38 Ark., 605.

[2] Abrams *v.* Foshee, Ala., 278; Butler *v.* Wood, 10 How. Pr. (N. Y.), 222; Belt *v.* Spaulding, 17 Or., 130; 20 Pac., 827.

[3] State *v.* Crook, 16 Utah, 212; 51 Pac., 1091; State *v.* Fleetwood (Del.), 65 Atl., 772; De Pew *v.* Robinson, 95 Ind., 111; State *v.* Crofford, 133 Ia., 478; 110 N. W.; Munk *v.* Frink, 75 Nebr., 172; 106 N. W., 425.

[4] Weightnovel *v.* State, 46 Fla., 1; State *v.* Belya, 9 N. D., 353; 83 N. W., 1; People *v.* Aiken, 66 Mich., 484; 33 N. W., 821; Florien *v.* State, 8 Ohio, C. D., 171.

[5] Sullivan *v.* State, 121 Ga., 183; 48 S. E., 949.

[6] State *v.* Cooper, 22 N. J. L., 52, 55.

with embryo life, and gestation has begun, the crime may be perpetrated. If this were not so it would be practically impossible to convict an abortionist for any abortion, or attempted abortion, during the first five months of pregnancy; for if gestation had not proceeded to the period of quickening there would be no way of disputing the testimony of the abortionist that what he removed was in fact a dead fetus.[1] As stated by the Supreme Court of Pennsylvania: "It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman, because it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature, which obstructs the fountain of life, and therefore it is punished."[2] This question is now regulated by statutes in the several States which specify what acts shall constitute the crime. In the majority of the States these statutes fail to draw any distinction between the commission of the offence or attempt at commission before and after the quickening of the child. Some jurisdictions, however, still make a distinction by providing a more severe punishment when the act or attempt is committed after quickening.

(*c*) **Pregnancy as Element of the Offence.**—Pregnancy is the state of being with child and designates the condition of a woman from the time of conception until she has been delivered of the child.[3] It has been held that pregnancy ceases even when the child which has been brought forth is still attached to the umbilical cord.[4]

[1] Munk *v.* Frink, Nebr., 116 N. W., 525; State *v.* Slagle, 83 N. C., 630; Mills *v.* Com., 13 Penn., 633.

[2] Mills *v.* Com., 13 Pa., 632.

[3] State *v.* Howard, 32 Vt., 380.

[4] Com. *v.* Brown, 14 Gray (Mass.), 419.

(*d*) **Malice as Element of the Offence.**—Malice is not an element of the offence,[1] though it has been defined by statute as doing the forbidden act maliciously.[2]

(*e*) **Means Employed.**—(1) *In General.* — In a majority of States it is not necessary that the thing administered should actually produce the effect desired,[3] or that it should have qualities efficient to produce that result,[4] though some courts have held otherwise.[5] The testimony of a physician is sufficient to show that the means are capable of producing an abortion.[6]

(2) *Administering Drugs.*—The word "administer" includes to "give, furnish, supply, provide with, or cause to be given, furnished, supplied, or provided with, or taken any such drug, medicine, or substance," and every mode of "giving, furnishing, supplying, providing with, or causing to be taken any such drug, medicine, or substance."[7] Giving a drug to a person is administering within the intent of the Delaware statute.[8] Sending a drug by mail to be taken by the receiver to procure abortion is an administering thereof within the intent of the Iowa statute. There seems to be a conflict as to whether the means administered or advised to be used need to be actually used in order to constitute the offence. It has been held in

[1] State *v.* Belyea, 9 N. D., 353; 83 N. W., 1.

[2] Com. *v.* Wood, 11 Gray, 85; Com. *v.* Morrison, 16 Gray, 224; State *v.* Murphy, 27 N. J. L., 112.

[3] See the statutes in the several States.

[4] State *v.* Owens, 22 Minn., 238.

[5] Fretwell *v.* State, 43 Tex. Crim., 507; 67 S. W., 1021; Cave *v.* State, 33 Tex. Crim., 335; 26 S. W., 503.

[6] Cave *v.* State, 33 Tex. Crim., 335; 26 S. W., 503.

[7] Caughey *v.* State, 156 Ind., 41; 59 N. E., 169.

[8] State *v.* Jones, 4 Penn. (Del.), 109; 53 Atl., 858.

several States that they need not be actually used to complete the offence.[1]

(3) *Noxious Drugs.*—At common law, and under some statutes making it an offence to administer any noxious drug or other thing to procure an abortion, it is essential that the drug should be of a noxious character.[2]

A drug to be "noxious and destructive" need not be poisonous. It is sufficient if it would so operate on the general system as to probably occasion injury or derangement to a pregnant woman and make miscarriage possible, if there is an intent to produce a miscarriage. So it has been held that boneset administered with such intent comes within the meaning of the statute even though it has no quality to produce abortion.[3] A small quantity of savin, which was sufficient only to produce a little disturbance of the stomach, has been held not to be a noxious thing.

(4) *Efficiency of Means.*—The actual miscarriage of a woman in some States is an essential element of the crime.[4] but in the majority of the States it is not essential to the consummation of the statutory offence, the consequence not being held material.[5]

(5) *Violent Assault and Immoderate Exercise.*—A statute forbidding the use of any instrument "or other means" to procure an abortion includes a violent

[1] Eggart *v.* State, 40 Fla., 527; 25 So., 144; State *v.* Moothart, 109 Ia., 130; 80 N. W., 301; State *v.* Murphy, 27 N. J. L., 112.

[2] State *v.* Gedricke, 43 N. J. L., 86; State *v.* Crews, 128 N. C., 581; 38 S. E., 293; State *v.* Slagle, 82 N. C., 633.

[3] Dougherty *v.* People, 1 Colo., 514.

[4] *Illinois*—Scott *v.* People, 141 Ill., 195; 30 N. E., 329. *Indiana*—Hauk *v.* State, 148 Ind., 238; 46 N. E., 127. *Ohio*—State *v.* Barker, 28 Ohio St., 583.

[5] *Colorado*—Dougherty *v.* People, 1 Colo., 514. *Delaware*—State *v.* Magnell, 3 Penn., 307; 51 Atl., 606. *Iowa*—State *v.* Moothart, 109 Ia., 130; 80 N. W., 301. *Massachusetts*—Com. *v.* Taylor, 132 Mass., 261. *New Jersey*—State *v.* Gedicke, 43 N. J. L., 86. *Pennsylvania*—Com. *v.* W. M. W., 3 Pittsb., 463. *Texas*—Willingham *v.* State, 33 Tex. Crim., 98.

assault, consisting of a kick in the abdomen; on a woman between five and six months advanced in pregnancy, where the kick was made with the intention of causing her to miscarry, and where it in fact did cause her to miscarry.[1] It has been held that the procurement of a pregnant woman to engage in immoderate and excessive exercise with the intent to bring about a miscarriage is an offence within the statute.[2]

(*f*) **Liability as Principals.**—Under the statutes, any person who unlawfully supplies, administers to, prescribes for, or advises or causes to be taken by a pregnant woman any drug, poison, substance, or any thing, or unlawfully uses or causes to be used any instrument or other means whatever, with intent to cause or procure an abortion, is a principal.

(*g*) **Liability as Accessories and Accomplices.**—Any person who in any manner aids, abets, or assists the woman or any other person to procure an abortion is an accessory or accomplice.[3] All parties concerned in the offence are responsible, whatever may be the part they take.

(*h*) **Defence to Prosecution for Procuring Abortion.**—(1) *In General.*—The general rule is that no fact or circumstance which is not excepted by the statute is available as a defence. So it is not a defence to such prosecution that the defendant did the act charged with the consent or at the request of the woman.[4]

(2) *Justification for Procuring an Abortion.*—The statutes of the several States, in making it a crime

[1] Navarro *v.* State, 24 Tex. App., 378; 6 S. W., 542.

[2] Com. *v.* W. M. W., 3 Pittsb. (Pa.), 463.

[3] See statutes of the several States.

[4] *Connecticut*—State *v.* Carey, 76 Conn., 342. *Delaware*—State *v.* Magnell, 3 Penn., 307. *Iowa*—State *v.* Moore, 25 Ia., 128. *Massachusetts*—Com. *v.* Snow, 116 Mass., 47. *Michigan*—People *v.* Abbott, 116 Mich., 263. *Wisconsin*—Miller *v.* Bayer, 94 Wis., 123.

to procure an abortion, expressly except those cases in which the abortion may be necessary to preserve the life of the mother, or shall have been advised by a specified number of physicians to be necessary for such statutory provision the fact that the mother's life requires that a miscarriage be performed upon her is always a justification for producing abortion, whether the statute expressly so provides or not. If a physician seeks to justify his act of procuring an abortion on the ground that it was necessary to save life, without obtaining the advice of the number of physicians required by the statute, he must prove that the necessity did in fact exist. And it has been held that evidence showing that a physician operated with a knife upon the womb of a healthy woman, aged nineteen years, and a few days afterward she was delivered of a partly grown child, and was immediately attacked with peritonitis, of which she died, raises an inference that it was unnecessary to destroy the child in order to preserve the life of the mother; and the fact that the woman had threatened to commit suicide unless relieved from her child does not show such a necessity.[1]

It has been held to be no defence to an indictment under a statute requiring the advise of two physicians as to the necessity of performing the act to save life, that one of the defendants, who was a physician, thought the operation to be necessary to save the life of the mother, if the evidence shows that it was in fact unnecessary.[2]

[1] *Necessity to Save Life as Defence.*—State *v.* Lee, 69 Conn., 186; 37 Atl., 75; Honnard *v.* People, 77 Ill., 48; Worthington *v.* State, 92 Md., 222; 48 Atl., 355; Com. *v.* Brown, 121 Mass., 69; State *v.* Fitzporter, 93 Mo., 390; 6 S. W., 223; State *v.* Clements, 15 Or., 237; 14 Pac., 410; State *v.* Rupe, 41 Tex., 33.

[2] Hatchard *v.* State, 79 Wis., 357.

(3) *Alibi as Defence.*—If the physician or surgeon charged with the offence of procuring an abortion can prove that he was at another place than that at which the crime was alleged to have been committed at the time of the performance of the criminal act, this will be a good defence unless the jury are satisfied that the prosecution was in error as to the date stated by them. As was said by the court in Com. *v.* Snow, 116 Mass., 47: "If the alibi was satisfactorily proved, it was for the jury to say what effect it ought to have upon the testimony of the witness for the prosecution. It might discredit them altogether. If it did not have that effect, then it required an inference of some mistake on their part, either as to the person who performed the operation, or the true date of its performance. Their testimony was no more positive as to the date than it was as to the person; and they were at least quite as liable to make a mistake as to the true date as they were in regard to the identity of the person. But in any respect it was entirely a question of fact for the jury, and was rightly left to them to decide."

(4) *Consent of Woman.*—Consent of the woman to the procurement of an abortion is no defence.[1]

(5) *Dead Fetus as Defence.*—A woman who carries a fetus in her womb is pregnant whether the fetus is living or dead, and the fact that the fetus was dead at the time of the unlawful act is no defence. This does not apply, however, to cases where a physician performs an operation to remove a dead fetus.[2]

(6) *Former Acquittal.*—A plea of former acquittal may be a bar to another prosecution for procuring an abortion.[3]

[1] Smith *v.* State, 33 Me., 48.

[2] Honnard *v.* State, 77 Ill., 483; State *v.* Howard, 32 Vt., 380.

[3] State *v.* Crook, 16 Utah, 212.

(*i*) **Mode of Trial in Abortion Cases.**—A trial for homicide resulting from an attempt to produce the miscarriage of a pregnant woman is conducted, as a general rule, in all respects as is required where a criminal is on trial for homicide by killing in some other manner.[1] So a verdict for manslaughter may be returned in a prosecution for murder under a statute declaring an attempt to produce an abortion which causes the death of a woman shall be murder, as well as in the case of an indictment for any other kind of murder.[2]

(*j*) **Evidence in Abortion Cases.**—(1) *In General.*—As a general proposition the State must prove:

1. That the defendant wilfully prescribed or administered to a certain woman a medicine, drug, or substance, or used upon her an instrument or means.

2. The name of the medicine, drug, or substance prescribed or administered, or the name of the instrument or the means, if known, should be alleged and proved.

3. That the woman was pregnant at the time the medicine was prescribed or administered, or the instrument or means used. The stage of the pregnancy being immaterial. It may be at any time between conception and delivery.

4. That the medicine, drug, or substance was prescribed or administered, or the instrument or means used, on the part of the defendant with the intent to procure a miscarriage of the woman.

5. That such miscarriage, or means to procure it, was not necessary to preserve the life of the woman.

6. That such miscarriage, or means to procure it, had not been advised by at least two physicians to be necessary to preserve the life of the woman.

[1] Earll *v.* People, 73 Ill., 329.

[2] State *v.* Alcorn, 7 Idaho, 599, 64 Pac., 1014.

(2) *Proof of Opportunities and Facilities.*—As tending to establish both the crime and the intent with which it was committed, it is proper to introduce any proper evidence which will tend to prove or prove either the opportunity to commit the crime or the facilities with which it might have been committed. Thus it has been held competent to put in evidence the "speculum chair," and other surgical instruments adapted for use in producing abortion, found in the possession of the defendant, for the same reason that, upon a trial for burglary, implements of burglary found in the defendant's possession are admissible. They tend to show that defendant had the means and opportunity to commit the offence charged. It is clearly competent for medical experts to testify that the instruments found were adapted to produce abortion, that being a matter within the special experience of experts.[1] Knitting needles and bottles containing ergot, found in the possession of the accused, have been held admissible where there is evidence that such ergot and such instruments are sometimes used to produce abortion.[2]

It is also competent for the prosecution to show a willingness on the part of the accused to perform the criminal act. Thus it was held proper in the prosecution of a physician for a crime of this kind to admit in evidence a circular which read as follows: "Dr. ——'s female regulator; married ladies should not take it. For reference apply at this office. Office hours from 8 to 11 A.M., and from 1 to 5 P.M."

"A card, —— Dr. —— would respectfully announce to the ladies of S—— and vicinity that he is at all times ready and happy to have a social consultation upon

[1] Com. *v.* Brown, 121 Mass., 69; Com. *v.* Blair, 126 Mass., 40.
[2] State *v.* Barnes (N. J.), 68 Atl., 145.

all matters relating to pregnancy or confinement, or in regard to lawful production of a premature birth, which, in all proper cases, he will produce in a skilful manner, guarantee an easy time, and speedy recovery. For the information of all I insert the statute in reference to the unlawful production of premature birth, which is as follows, to wit: 'Every woman who shall solicit of any person any medicine, drug, or substance, or anything whatsoever, and shall take the same, or shall submit to any operation or other means whatsoever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. 2 R. S., 694, Sec. 21.'

"It is a well-settled rule of law that a person cannot be compelled, under any circumstances, to answer a question where the answer would convict or tend to convict the person of a crime. Ladies, your secrets are with yourselves, and yourselves alone, whether in the street, at your home, or as a witness, and you need answer no question when the answer would in any way tend to harm you, as stated above, or to make you liable under this statute to a criminal action. And, ladies, should you ever require legal assistance in any of these matters, of course, employ such counsel as you think proper; but if you are not pecuniarily able, or too delicate to act in the matter, notify me, and I will protect you at my own expense.

(SIGNED) "Dr.——

"S——, N. Y."

Justice Miller in commenting upon the competency of this very extraordinary circular said: "The circular was, I think, competent as a declaration of the prisoner that he made a specialty of this business and was versed and skilled in regard to it. It corroborated the proof introduced upon the trial, and was a statement of himself to the effect that he made it a part of his business to attend to cases of this kind. With evidence that an abortion had been procured while deceased was under the prisoner's charge, his own advertisement that he was ready to perform operations of such a character certainly tended to strengthen the testimony already introduced, and was clearly admissible."[1] Evidence that the accused had, before the commission of the alleged abortion, told other persons that he had instruments wherewith to produce abortion, and offered his services for that purpose at a certain price, is admissible to show possession of the necessary means to accomplish the act in the chosen way of the accused.[2]

(3) *Corroborative Proof.*—Under some statutes there can be no conviction unless the woman on whom the operation was alleged to have been produced is corroborated by other testimony or circumstances. The rule in this, as in other such cases, is that she must be corroborated on every essential element of the crime. And as the intent is not an essential element, but the gist of the offence, she must be corroborated in this particular. As stated by one court: "She must also have been corroborated by circumstances, or otherwise, in at least some portion of her testimony which imputes to the defendant the commission of the crime alleged, to wit, in the use of an instrument with intent

[1] Weed *v.* People, 3 Thomp. & C., 50.
[2] People *v.* Sessions, 26 N. W. Rep., 291.

to procure an abortion."[1] Under a statute which provided that a conviction should not be had on the evidence of an accomplice in the absence of corroborative proof, it was held in a case where the husband occupied the position as accomplice in causing the death of his wife by consenting to an abortion, that the dying declarations of the wife supporting the statements of the husband were sufficient corroborative proof to sustain a conviction.[2] But where the record does not affirmatively show that there was no corroborative evidence, and where it does not purport to contain all the evidence upon that point, the presumption of law is that there was sufficient competent evidence to support the verdict.[3]

(4) *Proof of Intent.*—Acts and letters of the defendant implicating him in the intent to bring about a woman's abortion may be proved against him. Intent may be inferred from the character of the means employed, and may be presumed if the statutory ingredients of the crime are shown.[4] To prove intent it is admissible to show a subsequent attempt to accomplish the same purpose by different means,[5] and to prove that ergot, a drug shown to have been administered to the deceased, was popularly supposed to produce abortion.[6] Testimony as to the physical condition of the woman after the time of the alleged operation is admissible[7] even though ten days have elapsed since the performance of the alleged act,[8] and evidence of the health and spirits of the patient

[1] People *v.* Josselyn, 39 Cal., 393.
[2] State *v.* Pearce, 56 Minn., 226; 57 N. W., 652.
[3] State *v.* Owens, 22 Minn., 238.
[4] Scott *v.* People, 141 Ill., 195; State *v.* Moothart, 109 Ia., 130; 80 N. W., 301.
[5] Lamb *v.* State, 66 Md., 285. [6] Carter *v.* State, 2 Ind., 617.
[7] Com. *v.* Wood, 11 Gray (Mass.), 85; People *v.* Olmstead, 30 Mich., 431.
[8] Com. *v.* Follansbee, 155 Mass., 274.

and of stains and marks upon the bed and clothing a month afterward has been held admissible, though the length of time may affect the weight of such evidence.[1] Evidence of a conversation between the defendant and a witness two or three years before the time of the act, when the defendant asked for information as to how abortions might be procured, is not admissible, as it is too remote.[2]

(5) *Dying Declarations.*—Dying declarations are statements of material facts concerning the cause and circumstances of a homicide, made by the victim under a solemn conviction of impending death.[3] In order that the declarations of a deceased person may be admissible under the dying declarations rule, the declarant must at the time of making them have been in extremis and fully conscious of his impending dissolution. Both of these conditions must exist.[4]

Greenleaf says: "It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued an hour afterward, the declaration is inadmissible.

"On the other hand, a belief that he will not recover is not in itself sufficient, unless there be also the prospect of almost immediate dissolution."[5]

The reason for excepting dying declarations from the rule against hearsay evidence is that the solemnity of the circumstances under which such declarations

[1] Com. *v.* Wood, 11 Gray (Mass.), 85.
[2] Com. *v.* Hersey, 2 Allen (Mass.), 173.
[3] Westbrook *v.* People, 126 Ill., 82.
[4] Young *v.* State, 99 Ala., 181; Jones *v.* State, 71 Ind., 73.
[5] Greenleaf on Evidence, Sec., 158.

are made naturally constitutes a guaranty of their truth equal to that which is afforded by the customary oath.[1] Since dying declarations are admissible only in homicide cases, it follows, as a general rule, that dying declarations are admissible in prosecutions for abortions when, and only when, the death of the woman is an ingredient of the offence, so as to be involved in the charge.[2] They are not admissible where the statutes which define and prescribe a punishment for abortion do not make the death of the woman one of the constituent elements of the offence.[3] Where, however, the statutes provide for the punishment of abortions resulting in death, the woman's dying declarations have been admitted on the theory that the death is an essential ingredient of the offence, and the subject of the charge.[4] In some jurisdictions the dying declarations of the woman have by the express terms of the statutes been made admissible in prosecutions for abortions.[5] A prosecution for homicide committed by performing an abortion is not properly a prosecution for abortion, but for homicide, and the dying declarations of the woman as to the abortion are admissible.[6]

Dying declarations are not rendered inadmissible in the prosecution of an indictment committed in an attempt to commit an abortion, upon the theory that in prosecutions for abortion the death of the woman is no part of the facts which go to constitute the crime, and not a constituent element of the offense,

[1] Mitchell *v.* State, 71 Ga., 128.

[2] Montgomery *v.* State, 80 Ind., 338; Railing *v.* Com., 110 Pa., 100.

[3] Com. *v.* Homer, 153 Mass., 343; People *v.* Davis, 56 N. Y., 95; Railing *v.* Com., 110 Pa., 100.

[4] Montgomery *v.* State, 80 Ind., 338.

[5] Com. *v.* Thompson, 159 Mass., 56; Maine *v.* People, 9 Hun. (N. Y.), 113.

[6] Simons *v.* People, 450 Ill., 66; State *v.* Dickinson, 41 Wis., 299.

where the indictment is not for the statutory crime but for homicide.[1] A dying declaration by a woman, "Dr. Mame operated on me," is not an expression of an opinion, but the statement of a fact peculiarly within her knowledge, which is admissible in evidence in a prosecution for causing her death in an attempt to procure an abortion.[2] Statements made by a woman when about to die from the effects of an abortion: "He is the cause of my death. Oh, those horrible instruments!" are not admissible as dying declarations in a prosecution for murder in the commission of abortion, since such declarations did not necessarily refer to any attempt to produce an abortion.[3]

(6) *Declarations of Mother.*—Declarations of the deceased woman not part of the res gestæ and not dying declarations are inadmissible in prosecutions for procuring or attempting to procure abortion.[4] Thus a statement by the deceased woman a day before her death that "the doctor had used instruments upon her" was inadmissible, because it was not a dying declaration.[5] Likewise, statements of the deceased woman that she had been at the defendant's house for two weeks, had come there to be treated by him, and a week after her arrival had had a miscarriage, are inadmissible.[6] Statements and letters and conduct of the woman which are so closely connected with the acts alleged as to be part of the res gestæ are admissible.[7] By the term "res gestæ" is meant "the facts surrounding or accompanying a

[1] Smith *v.* State, 33 Me., 48.

[2] Maine *v.* People, 9 Hun., 113.

[3] State *v.* Baldwin, 79 Iowa, 714; 45 N. W., 297.

[4] Hauk *v.* State, 148 Ind., 238; 47 N. E., 465; State *v.* Young, 55 Kan., 349; 40 Pac., 659; State *v.* Wood, 53 N. H., 484.

[5] State *v.* Clements, 15 Or., 237; 14 Pac., 410.

[6] Weightnovel *v.* State, 46 Fla., 1; 35 So., 856.

[7] State *v.* Ryder, 80 Vt., 422; 68 Atl., 652; State *v.* Dickinson, 41 Wis., 299.

transaction which is the subject of legal proceedings. The phrase is chiefly used in the law of evidence, the rule being that evidence of words used by a person may be admissible (notwithstanding the general rule against derivative evidence) on the ground that they form part of the res gestæ, provided that the act which they accompanied is itself admissible in evidence and that they reflect light upon or qualify that act.[1]

It has been held that declarations of the deceased woman, as to the purpose of a journey which she took to the house of the defendant, were properly admitted as part of the res gestæ. "The mere act of going was equivocal; it might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible as part of the act."[2]

So, too, where a woman conspires with others to procure an abortion on herself, on proof of the conspiracy, her acts and declarations, in furtherance thereof, are admissible in evidence against the co-conspirators. For example: The declarations of a woman dying in consequence of an abortion performed on her, she having conspired with a physician to have the operation performed, are admissible in evidence against the physician on his trial for murder as a result of the abortion, so far as they relate to the conspiracy.[3] The woman on whom the abortion has been performed is a competent witness against the physician, even though she be regarded as an accomplice.[4] Declarations and exclamations indicative of pain or suffering, made by the woman in her last

[1] Rapalje and Lawrence's Law Dict.
[2] State *v.* Howard, 32 Vt., 380.
[3] State *v.* Crofford, 133 Ia., 478: 110 N. W., 921.
[4] Com. *v.* Follansbee, 155 Mass., 274.

illness, and not referring to the past, are competent evidence.[1] Thus declarations of a deceased woman, soon after her arrival at the house where the abortion was performed, are admissible as to her feelings and state of health, if material, but the rejection of immaterial declarations of this kind, as where the question was not raised whether the physician acted professionally in good faith in what he did, is not ground for the granting of a new trial.[2]

For Maintaining House for Practising Abortion.— Maintaining a house for the purpose of practising the vocation of an abortionist constitutes a public nuisance,[3] within the meaning of the New York statutes.

4. FOR SALE OF INTOXICATING LIQUORS

A physician has a legal right to administer intoxicating liquors to his patients, and the numerous statutes on the subject of intoxicating liquors have seldom attempted to prevent him from so doing, even in prohibition States.[4] If the physician buys the liquor for his patient and turns it over to him, in pursuance of a prescription he has given him, he commits no offence.[5] In several jurisdictions it has been held that a physician cannot sell liquor to his patients nor put it in prescriptions unless he has a permit to sell liquor.[6] In one State, where the statute made no

[1] Rhodes *v.* State, 128 Ind., 189.

[2] State *v.* Howard, 32 Vt., 380.

[3] People *v.* Hoffman, 189 N. Y., 561; 82 N. E., 1130.

[4] State *v.* Wilson, 71 Kan., 263; 80 Pac., 565; Sarris *v.* Com., 83 Ky., 327; State *v.* Larimore, 19 Mo., 391; Walker *v.* State (Tex.), 64 S. W., 1052.

[5] Key *v.* State, 37 Tex. Cr. App., 77, 38 S. W., 773.

[6] *Colorado*—Braisted *v.* People, 38 Colo., 49, 88 Pac., 150. *Iowa*—State *v.* Benadone, 79 Iowa, 90, 44 N. W., 218. *Kansas*—State *v.* Fleming, 32 Kan., 588, 5 Pac., 19. *Nebraska*—Holt *v.* State, 62 Nebr., 134, 86 N. W., 1073.

exception as to physicians, it was held that a physician could not furnish liquor to his patient as a medicine, though he acted in the utmost good faith.[1] In Georgia, a medical preparation containing sufficient alcohol to render its sale without a license unlawful, is not justified by the fact that it is sold as a medicine.[2]

Where a physician may administer liquor to a patient he must act in the utmost good faith. He cannot use his professional power as a means of furnishing liquors as a beverage, or to one who does not need it. In one case where a physician gave a prescription for a quart of whisky, which was filled at a drug store owned by a partnership of which he was a member, the sale was held illegal.[3] The physician must make the sale as a physician, and reasonably believe that the patient needs it, and not upon the suggestion of the patient that he needs it.[4] A statute is valid that casts upon the physician the burden of showing that the condition of the patient reasonably demanded the use of intoxicating liquors.[5]

5. FOR ILLEGALLY PRESCRIBING INTOXICATING LIQUORS

In one or two States statutes prohibit a physician giving a prescription for liquor when the person to whom it is given does not actually need the liquor. If the physician believes in good faith that the patient needs the liquor he may prescribe for him,[6] though it

[1] Carson *v.* State, 69 Ala., 235; Thomason *v.* State, 70 Ala., 20.
[2] Chapman *v.* State, 100 Ga., 311.
[3] Brinson *v.* State, 89 Ala., 105; 8 So., 527.
[4] State *v.* Cloughly, 73 Iowa, 626; 35 N. W., 652.
[5] Commonwealth *v.* Minor, 88 Ky., 422, 11 S. W., 472.
[6] Ibid., 118 W., 472.

turns out he was purposely deceived by the patient in order to obtain the liquor.[1]

To show that the physician did not act in good faith, evidence of the number of prescriptions he has given to other persons within a reasonable limited period of time when the particular prescription was legally given may be introduced for the purpose of showing an intent on his part to violate the law.[2]

A statute casting upon the physician the burden to show that the patient actually needed the liquor is constitutional.[3] A statute prohibiting a physician giving a prescription in a prohibition county to one not actually ill, has no reference to a physician writing a prescription for himself.[4] In Illinois it was held that an ordinance forbidding a physician to give a patient a prescription for liquor when he really did not need it was authorized, and neither unreasonable, oppressive, nor an unjust discrimination against the physicians as a class.[5]

A physician cannot be indicted in a prosecution for giving an illegal prescription for an illegal sale of intoxicating liquors, for by giving the prescription he does not make a sale. The charge must be for giving an illegal prescription, or a prescription to a person who could not otherwise obtain it, and such allegations must be used as will show that it was illegally issued.[6] The prescription should be described in such a manner that the court can, by inspection, pronounce whether it was such an instrument as

[1] Commonwealth *v.* Williams, 120 Ky., 314; 86 S. W., 553; People *v.* Hinchman, 75 Mich., 587; Walker *v.* State (Tex.), 64 S. W., 1052.

[2] State *v.* Atkinson, 33 S. C., 100; 11 S. E., 93.

[3] Commonwealth *v.* Minor, 88 Ky., 422; 11 S. W., 412.

[4] Hawk *v.* People, 44 Tex. Cr. App., 560; 72 S. W., 842.

[5] Carthage *v.* Buckner, 4 Ill. App., 317.

[6] Williams *v.* State (Tex. Cr. App.), 81 S. W., 1209.

supports the offence charged.[1] Whether or not a prescription was given in good faith is a question for the jury.[2]

A physician who assists one to purchase liquor for himself, by giving him an illegal prescription, thereby becomes an accomplice of the seller and is guilty of assisting or making the sale.[3]

6. FOR PRESCRIBING OR ADMINISTERING WHILE INTOXICATED

The legislatures of several States have expressly provided that a physician who administers while intoxicated a poisonous drug or medicine which results in death is guilty of manslaughter; others have passed laws making it a crime for one to practise as a physician while intoxicated.[4]

7. FOR ILLEGAL USE OF ANESTHETICS

Because of the seeming reality of dreams occasioned by narcotics and their tendency to remain permanently fixed in the memory, with all the vividness of actual events, as well as for the protection of the patient, statutes have been passed in several States declaring it to be a crime to "use upon another an anesthetic unless at administration, and during the whole time the person is wholly or partly under the direct influence of it, there is present a third person competent to be a witness."[5]

[1] McAllister *v.* State, 47 So., 161.

[2] Rowe *v.* Commonwealth, 24 Ky. L. Rep., 974; 70 S. W., 407.

[3] McLain *v.* State, 43 Tex. Cr. App., 213; 64 S. W., 865.

[4] See the statutes of California, Idaho, Indiana, Florida, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, New York, North Dakota, Ohio, Oregon, South Dakota, Utah, Wisconsin, and Wyoming.

[5] See the statutes of the several States.

8. FOR OBTAINING MONEY UNDER FALSE PRETENCE

A false pretence is such a fradulent representation of an existing past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value. The word "pretence" has been defined to be a "false argument, grounded on fictitious postulates," which is clearly something more than a naked lie, the falsehood of which the person to whom it is uttered can detect at the moment by the immediate application of a test. In false pretences the money is obtained with the consent of the owner; the latter intended to part with it, for if it deprives him only of his money it is a theft. To sum it all up then, the offence of obtaining money under false pretence consists of: (1) A false representation as to an existing fact. (2) An intent to defraud. (3) A reliance upon such fraudulent representation. (4) Something of value obtained thereby.

It has been held by the United States Supreme Court, Mr. Justice White and Mr. Justice McKenna dissenting, that a school of magnetic healing is not making a fraudulent use of the mails by sending its advertising matter through the mails. Its business was advertised as being founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the healing, curing, benefiting, and remedying thereof, and that the human race is largely responsible for its ills, and is a perceptible factor in the healing, curing, benefiting, and remedying thereof, and that the human race is largely responsible for its ills, and is a perceptible factor in the healing, curing, benefiting, and remedy-

ing thereof, and that the human race does possess the innate power through proper exercise of the faculty of the brain and mind largely to control and remedy the ills that humanity is heir to, and they discard and eliminate from their treatment what is commonly known as Christian Science, and they are confined to practical scientific treatment emanating from the source aforesaid."[1]

The testimony of the prosecuting witness in a Maryland case for obtaining money under false pretence was as follows: "On Monday I went to see him [the accused] at the Eutaw House. I told the professor I wanted to see him, as I was sick for some time. The professor offered me paper, and told me to write my name and age upon it, and not to let him see what I wrote. I wrote my name and age on the paper, and he walked up and down the room and looked out of the window, and took the paper, folded it up, and placed it against his forehead, and then told me what I had written on the paper. He said: 'You suffer from stomach trouble, and I can and will cure you within six weeks; if not, I will return you your money.' He said: 'At the end of six weeks, if not cured, I will return you the money.' I asked him when I should call again, and he said: 'Don't come; I will come and see you and work on you four hours, and after that you will be well.' He also gave me a charm to wear. I wore it around my neck for one hour. He said, to wear it was essential to the treatment. I am not over the stomach trouble yet. He never came to my house and worked on me. I paid him twenty-six dollars and thirty cents."[2]

[1] School of Magnetic Healing *v.* McAnnulty, 187 U. S., 94.
[2] Jules *v.* State, 85 Md., 305

9. FOR SENDING OBSCENE LITERATURE IN THE MAILS

A physician may communicate, through the mails, to his patient in terms that would otherwise be obscene, but before he can do this the relation of patient and physician must exist. Matter is said to be obscene when its tendency is to excite libidinous thoughts and desires or to corrupt and deprave those whose minds are open to such immoral influences and into whose hands it may fall.[1] Persons publishing books necessary for medical instruction may be liable for uttering obscene libels if the effect is to debauch society or to make money by pandering to lascivious curiosity. That the object is philanthropic or scientific is no defence.[2]

Thus where the matter complained of was first a small pamphlet in paper cover, entitled "Dr. Clarke's Treatise on Venereal, Sexual, Nervous, and Special Diseases," and consisted mainly of a description of the causes and effects of venereal diseases; and secondly, of two circulars, one of which described, in separate paragraphs, the symptoms of various venereal diseases, and the other contained a list of questions to be answered, the court said: "In judging of the tendency of the publication to deprave and corrupt the mind, or to excite lustful or sensual desires, you should consider the effect that the publications would have on the minds of that class of persons whom the statute aims to protect, and the liability of the publications to get into the hands of that class of persons rather than the effect such class of persons would have on people of a high order of intelligence and those who

[1] Swearingen *v.* U. S., 161 U. S., 446.
[2] Com. *v.* Landis, 8 Phila., 453.

have reached mature years, who, by reason of their intelligence or years, are steeled against such influences."

10. FOR OBSCENE ADVERTISEMENT

An advertisement offering to cure venereal diseases by describing their symptoms in an inoffensive way is not obscene. For example: "An extraordinary medical announcement, free examination and diagnosticating of any deep-seated disease of man . . . specific blood poison.

"It is well that all men should know the consequences if the disease is imperfectly treated. The gravest of these is specific, vital, contracted blood poison, the disease that is first manifested by a stubborn sore, later by a rash on the body, then by the breaking out of ulcers, swelling of the glands, falling out of the hair and eyebrows. You cannot mistake these symptoms.

"If you find yourself in the clutches of blood poison, don't waste time and money on hot-spring baths, specifics, mercury, potash, or other mineral mixtures and poisons that will give only temporary relief.

"Dr. King's cure for blood poison, originated and perfected by him, is absolutely safe, rapid, and permanent, and leaves no injurious effects. Under his treatment every external symptom soon disappears, while the blood, the nerve fibers, the bones, and the whole system are cleansed, strengthened, and restored to perfect health and purity."

"Nervo-vital Debility."

"Cerebral—when the mental forces are impaired. Spinal—when the spinal centres are involved and motor power is diminished. Vital—when the great

sympathetic nerve system is affected and the forces that govern the organs of life are reduced by the baneful reflex effects of diseases incident to the organs of the pelvis."

"Private Diseases."

"Newly contracted and chronic diseases are cured by Dr. King. He relieves all burning and itching and stops inflammation and unnatural weakness in twenty-four hours; he effects cures in seven days."[1]

A municipal corporation cannot, under charter authority to regulate doctors and provide for the general welfare, forbid the publication of advertisements of relief for venereal and private diseases.[2]

11. FOR PRACTISING DENTISTRY

In the absence of any legislative declaration to the contrary, a certificate authorizing the holder to practise medicine and surgery will authorize him to practise dentistry, but a person who is licensed to practise medicine and surgery under the statutes of Minnesota cannot by virtue thereof practise dentistry without securing a license as a dentist.[3] On the other hand, the definitions in some statutes of "practice of medicine" are broad enough to include the practice of dentistry.

12. FOR FAILURE TO FILE CERTIFICATES OF BIRTHS AND DEATHS

The statutes of a great many States provide that physicians must make certain reports with certain

[1] St. Louis *v.* King (Mo.), 126 S. W., 495.
[2] Ibid.
[3] State *v.* Taylor, 106 Minn., 218.

registrars of all births and deaths. These statutes have been unconstitutional where the legislature has not provided a fee therefor. A physician has been held not to be wilfully negligent in failing to file a certificate of birth as the statute commanded, where he has made a voluntary effort to perform his duty by making certificate upon the blanks which had been supplied him by the public officer, and the offer to comply with new regulations, implied by his request that new blanks, therefore, be sent him, together with other circumstances, make plain that there was mere inadvertent omission of a required act in the sincere attempt to perform his duty as he understood it.[1]

[1] Brown *v.* State, 137 Wis., 543.

CHAPTER VIII

EXEMPTIONS OF PHYSICIANS AND SURGEONS

1. EXEMPTION FROM JURY DUTY

THE statutes of most of the States contain provisions expressly excusing physicians and surgeons from serving on juries. The exemption in such cases operates as a privilege and not as a disqualification, and if a physician who has been drawn on the jury chooses to serve he cannot be rejected by the parties to the suit merely because of his exemption.

In absence of statute expressly exempting physicians and surgeons from serving upon juries they are liable to such service unless they are held to come within some other class of persons who are exempt. These statutes have been enacted not for the benefit of the physician as an individual, but on account of the exigency of their employment and for the public benefit.[1] In Missouri[2] it has been held that such a statute does not exempt a dentist from jury duty.

2. EXEMPTION FROM EXECUTION

Physicians and surgeons are not entitled to the benefit of exemption laws using the term "mechanic" or the term "laborer." And a debt due for professional services of a physician is not a "claim for

[1] See the statutes of the several States.
[2] State *v.* Fisher, 119 Mo., 344.

labor."[1] On the contrary, however, if the statute is general, as where the term "debtors" is used, without specifying the occupation, they are entitled to the benefit of the law. Thus under a statute exempting the earnings of a "debtor" for personal services a physician may claim as exempt money due him for professional services.[2] In several States the legislatures have enacted statutes applying in express terms to physicians. The purpose of statutes exempting from execution the books, instruments, etc., of physicians and surgeons is to secure the necessaries of life—food, shelter, and raiment—to families who are dependent upon heads thereof by securing to them the instruments and means by the use of which they are enabled to support their families. Some courts have gone so far as to construe the word "trade" in exemption statutes to include physicians and surgeons.[3] The library of a professional man has been held not to be exempt after he has abandoned his profession.[4] The proceeds of a policy of insurance on the books and instruments of a physician which are by statute exempt from sale under execution for his debts are also exempt.[5] A physician's buggy, wagon, and harness have been held to be "tools of his occupation" within the meaning of the exemption law.[6] Likewise the instruments of a surgeon have been held exempt as his tools.[7]

Under the Iowa statute which exempts the horse or team, consisting of not more than two horses, by the use of which any physician habitually earned his

[1] Weymouth *v.* Sanborn, 43 N. H., 171.
[2] McCoy *v.* Cornell, 40 Iowa, 457.
[3] Whitcomb *v.* Reid, 31 Miss., 567.
[4] Cooper *v.* Pierce, 74 Tex., 526.
[5] Reynolds & Churchill *v.* Hanes, 83 Ia., 342.
[6] Richards *v.* Hubbard, 59 N. H., 158.
[7] Robinson's Case, 3 Abb. Pr., 466.

living, it has been held that a physician is entitled to claim as exempt two horses, if, by their use, he habitually earned his living; and this he could do whether he drove them together or not.[1] To entitle him to a buggy, "by the use of which he habitually earns his living," it is not necessary that at the time of procuring it he intended so to use it; but it is enough if at the time of seizure he was actually so using it.[2]

The horse of a country physician whose patients reside at too great distance to visit on foot has been held to be a "necessary team" within the exemption statutes.[3]

[1] Corp. *v.* Griswold, 27 Iowa, 379.
[2] Farnes *v.* Turner, 1 Iowa, 53.
[3] Wheeler *v.* Cropsey, 5 How. Pr. (N. Y.), 288.

CHAPTER IX

PHYSICIANS AND SURGEONS AS WITNESSES

1. COMPETENCY OF PHYSICIANS TO TESTIFY AS EXPERTS

(*a*) **In General.**—Physicians and surgeons are experts, and their opinions are admissible in evidence upon questions that are strictly legitimate and embraced in their profession and practice. As persons are presumed to understand questions appertaining to their own profession.[1]

The question of the competency of a witness to testify as an expert is one exclusively for the court, and all the evidence as to his competency should be received and considered by the court before permitting the witness to testify. His decision is, of course, reversible by an appellate court,[2] but it will not generally be reversed unless clearly wrong.[3] Thus the opinions of medical experts have been held admissible as to the permanency of a person's loss of vision;[4] as to the curability of a disease, the nature and cause of which he has described;[5] as to the condition of the body of the deceased as to fulness or paucity of blood;[6] as to whether fright would produce heart trouble;[7] and

[1] Dephur *v.* State, 44 Ala., 24; Missouri Pacific R. R. Co. *v.* Finley, 38 Kan., 550; State *v.* Clark, 15 S. C., 403, 408; Hathaway *v.* Nat. Life Ins. Co., 48 Vt., 335, 351.

[2] State *v.* Cole, 63 Iowa, 695; 17 N. W., 183.

[3] Green *v.* State, 64 Ark., 523; 43 S. W., 973.

[4] Finney *v.* New Jersey Steam Boat Co., 12 Abb. Pr. (N. S.), 1.

[5] Matteson *v.* New York, etc., R. R. Co., 35 N. Y., 487.

[6] O'Mara *v.* Com., 75 Pa., 424.

[7] Illinois Central R. Co. *v.* Latimer, 21 N. E., 7.

whether a child would have been born alive if it had received medical assistance in time.[1]

A medical expert can always testify concerning the nature and extent of an injury;[2] and as to whether a certain wound given on the chest endangered life;[3] whether a certain injury was likely to produce or be followed by certain diseases;[4] and as to the manner in which prolapsus uteri would be caused, and the degree of violence that would produce it.

They have been allowed to testify as to what indications would have been found on the postmortem examination of a body taken from the water, if the person had been suffocated first and then had fallen into the water.[5] But the opinion of medical experts will not be received as to facts within the common experience of men. Thus it has been held that a medical expert who had testified as to the injury of the plaintiff's fingers being very severe—that the fingers were badly mashed—that the middle finger was quite stiff, and forefinger permanently stiff—could not answer the following questions:

"I will ask you to state to what extent the injury impairs the usefulness of that hand for any skilled occupation, or any occupation requiring a quick and ready use of the hand?

"State the degree to which the usefulness of that hand would be impaired for skilled labor, requiring a quick and ready use of the fingers, such as coupling and breaking cars on the railroad?"[6]

"That a physician could not testify as to the possi-

[1] Western Union Tel. Co. *v.* Cooper, 71 Tex., 507.
[2] Evansville, etc., R. Co. *v.* Crist, 116 Ind., 446.
[3] Rumsey *v.* People, 19 N. Y., 41.
[4] Kelley *v.* Telegraph Co., 34 Minn., 321.
[5] Young *v.* Makepeace, 103 Mass., 50.
[6] Kline *v.* K. C., St. J. & C. B. R. Co., 50 Ia., 655.

bility of a rape having been committed in a particular manner, described by the prosecutrix. No peculiar knowledge of the human system was necessary to answer it. It was a mere question of relative strength or mechanical possibility, which an athlete or a mechanic could have answered as well as a physician, and every man upon the jury as well as either."[1]

Thus the opinions of surgeons are inadmissible in a murder trial as to the probable position of the victim when he received the blow or shot which caused his death;[2] or as to the position of the victim's arm when he received the fatal shot; or as to the relative position of the parties to a homicide.

A physician may not testify whether decedent was struck from behind or before, unless he describes the wound so minutely that the jury may judge for themselves of the accuracy of his conclusion.[3]

Qualifications Necessary for Medical Expert.—The qualifications of a medical expert are not dependent upon his having been educated in, or an upholder of, the doctrines of any particular school,[4] to determine the superiority of which would involve the possession of equal or superior expert abilities on the part of the court, and it will suffice if he has studied his profession without being actively engaged in the practice of it.[5]

Physicians and surgeons in the absence of a statutory requirement are not required to have a license from any board or a diploma from a medical school in order to be competent to testify as experts.[6] A witness

[1] Cook *v.* State, 24 N. J. L., 843.
[2] Kennedy *v.* People, 39 N. Y., 245.
[3] Parrott *v.* Commonwealth (Ky.), 47 S. W., 452.
[4] Bowman *v.* Woods, 1 Greene (Iowa), 441; 1 Wharton Ev., Sec. 441.
[5] 31 Greenl. Ev., Sec. 440.
[6] New Orleans R. R. Co. *v.* Allbritton, 38 Miss., 242; State *v.* Speaks, 94 N. C., 865; see also the Wisconsin Statutes which require a license or diploma to entitle one to testify as a medical expert.

who testifies that he is a "botanic physician;" that he has his medicines patented; has a right to sell them everywhere, but has no license to practise, is incompetent to give an opinion as to the effect of certain offensive odors upon a person's health.[1]

Experience Necessary in Special Cases.—It is not necessary to show experience in special cases in order to entitle a physician or surgeon to testify as an expert. A general practitioner is, ordinarily, a competent witness.[2] A physician may be qualified as an expert, although his knowledge may have been gained by reading and sources other than personal experiments.[3] Thus it has been held that a physician may be examined as to injuries done to the eyes of a party by violence, although he may not be a surgeon or an oculist.[4]

But a specialist who has no practical experience beyond his specialty is incompetent, as a general rule, to express an opinion on a question that does not pertain to his specialty. Thus a specialist in diseases of the eye cannot testify as an expert in relation to mental diseases.[5] A general practitioner is probably not incompetent to give expert testimony on the ground that he had not had, in his experience, a case like the one in question.[6] Thus a physician or surgeon who had never seen a wound made with a knife or dirk has been held competent to express an opinion that the wound in question was made with a dirk.[7] A physician has been allowed to state the effect of a

[1] Hochstrasser *v.* Martin, 16 N. Y. S., 558.

[2] Kelly *v.* United States, 27 Fed. Rep., 616; Hathaway *v.* National Life Ins. Co., 48 Vt., 335.

[3] Isenhone *v.* State, 157 Ind., 517.

[4] Castner *v.* Sliker, 33 N. J. L., 95.

[5] Fairchild *v.* Bascomb, 36 Vt., 410.

[6] State *v.* Clark, 12 Ired. (N. C.), 151.

[7] Mendum *v.* Com., 6 Raud. (Va.), 704.

certain drug on the womb, although he was without any personal knowledge of the effects of the drug, his knowledge on the subject being derived from reading.[1] A physician in active practice for more than twenty-five years has been held incompetent to testify that certain symptoms which had been described indicated arsenical poisoning, where he had never had a case of arsenical poisoning to treat as a physician.[2]

A medical practice confined to the treatment of ordinary diseases does not qualify a physician to testify as an expert on questions which pertain to a particular branch of medical science to which the physician has given no study, and concerning which he has had neither observation nor experience. For example, such a general practitioner cannot testify as an expert upon insanity, upon hypothetical questions as to supposed facts, of which he had no personal knowledge.[3] Neither can such a physician testify as an expert as to the effect upon health of breathing illuminating gas where he has had no experience with the effects of gas upon health.[4] A physician who is an expert relatively to the subject matter on which he was examined is not disqualified by the fact that he is not engaged in active practice at the time.[5]

Accordingly a witness has been held competent to testify as a medical expert where he has attended a course of medical lectures, has obtained a license from the State, and has practised as a physician for a year before he abandons the medical profession for that of the law, where he has continued to read medical books, and has kept up with the advance made in

[1] State *v.* Wood, 53 N. H., 484.
[2] Soquet *v.* State, 72 Wis., 659.
[3] Russell *v.* State, 53 Miss., 367.
[4] Emerson *v.* Lowell Gas Light Co., 6 Allen. (Mass.), 146.
[5] Everett *v.* State, 62 Ga., 65.

the science of medicine, and feels competent to express an opinion upon the subject.[1]

(*b*) **Competency of Opinions Based on Statements Made Out of Court.**—The rule is that a medical expert has no right to give in evidence an opinion based on information which he has derived from statements made to him by parties out of court and not under oath.[2] In order for his opinion to be admissible, it must be founded either on his personal knowledge of the facts, upon facts testified to in court, or upon a hypothetical question.[3]

(*c*) **Competency of Opinions Based Partly on the Patient's Declarations.**—The opinion of a surgeon or a physician being necessarily formed in part on the statements of his patient, describing his condition and symptoms, and the causes which have led to the injury or disease under which he appears to be suffering, is clearly competent as coming from an expert. The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the condition of health or disease is founded.[4]

It is also competent for physicians or surgeons to give their opinions based on a personal examination of the patient and on statements made by the patient at that time as to the patient's present bodily condition.[5]

[1] Tullis *v.* Kidd, 12 Ala., 648.

[2] Hurst *v.* C. R. I., etc., R. Co., 49 Ia., 76.

[3] Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich., 537; Louisville, etc., R. Co. *v.* Shires, 108 Ill., 617.

[4] Barber *v.* Meriam, 11 Allen (Mass.), 322; Quaife *v.* Chicago, etc., R. Co., 48 Wis., 513.

[5] Wilson *v.* Granby, 47 Conn., 59; Louisville, etc., R. Co. *v.* Snyder, 117 Ind., 435; Fort *v.* Brown, 46 Barb. (N. Y.), 366; Denton *v.* State, 1 Swan. (Tenn.), 279.

(*d*) **In Cases Concerning Wounds.**—It is well settled that medical experts can give their opinions as to the means by which a wound was inflicted. Thus medical experts who were present at the autopsy and examined the head of the murdered person may testify that in their opinion the injuries to the head could not have been produced at the same time and by one blow,[1] and a practising physician may be asked his opinion as to the kind of instrument used in inflicting the wound,[2] whether a club, knife, crowbar, musket, or razor, or by a gunshot,[3] and as to the direction from which blows were received. For example, a witness who has made a postmortem examination of the body, and has stated that it enabled him to form an intelligent opinion on the subject, has been allowed to testify that the blow was delivered from behind and above the head of the person struck, and from the left toward the right.[4] A North Carolina court has held it proper to ask a physician the question: "Assuming that the jury should believe that the prisoner and deceased were about the same height, and that the pistol was fired by the prisoner in the manner and position testified to by the State's witnesses, what, in your opinion, would have been the range of the shot after entering the skull, taking into consideration the bone, muscles, and other substances in the head?"[5] But a physician is not competent to express an opinion as to the posi-

[1] Commonwealth *v.* Piper, 120 Mass., 185.

[2] Territory *v.* Eagan, 3 Dak., 119; Williams *v.* State, 64 Md., 384.

[3] (*Club*) State *v.* Seymour, 94 Iowa, 699; Wait *v.* State, 13 Tex. App., 169; Carthans *v.* State, 78 Wis., 560; (*knife*) Batten *v.* State, 80 Ind., 394; State *v.* Clark, 12 Ired. L. (34 N. Car.), 151; State *v.* Chee Gong, 17 Or., 635; (*crowbar* or *adze*) Davis *v.* State, 38 Md., 35; (*musket*) Gardiner *v.* People, 6 Park. Cr. Rep., 155; (*razor*) State *v.* Knight, 43 Me., 11; (*gunshot*) Prince *v.* State, 100 Ala., 144; People *v.* Wonglehuey, 117 Cal., 624; State *v.* Cross, 68 Iowa, 180.

[4] Hopt *v.* Utah, 120 U. S., 431.

[5] State *v.* Keene, 100 N. C., 509.

tion of the body when the blow was struck.[1] Nor can he testify as to how the wounds upon the defendant were probably made. Such testimony not being peculiarly within the knowledge of the witness or of the medical profession.[2] But a physician or surgeon is not incompetent to express an opinion on the subject of wounds, because of his want of observation of any case like the one in question. For example, a physician or surgeon who has never seen a wound made with a dirk, is competent to express an opinion that the particular wound was made with a dirk,[3] though it might lessen the credit given to his testimony.[4] Nor is it necessary that a medical witness should have actually seen the wounds in order to qualify him to testify as an expert, as his testimony must be based upon a description of the wound given in court by those who saw it.[5] In the examination of an expert as to the appearance of the bullet wound of which deceased died, it is not improper to state a supposed case as a means of showing what, under different conditions, the appearance of a wound made by the same agency might or would have been.

(*e*) **On the Cause of Death.**—Physicians may give their opinions as to the cause of the death of any particular person, such opinions being based upon a personal knowledge of the facts of the case, or upon a statement of the symptoms of the disease or injury as detailed by others.[6] Such as death was produced

[1] Kennedy *v.* People, 39 N. Y., 245. [2] State *v.* Rainsbarger, 74 Ia., 196.
[3] Mendum *v.* Com., 6 Raud. (Va.), 704.
[4] State *v.* Clark, 12 Ired. (N. C.), 151. [5] Page *v.* State, 61 Ala., 16.
[6] *Alabama*—Mitchell *v.* State, 58 Ala., 418. *Arkansas*—Polk *v.* State, 36 Ark., 117, 124. *Illinois*—Schneider *v.* Manning, 121 Ill., 376. *Florida*—Newton *v.* State, 21 Fla., 56. *Michigan*—People *v.* Barker, 60 Mich., 277. *Mississippi*—Pitts *v.* State, 43 Miss., 472. *North Carolina*—State *v.* Bowman, 78 N. C., 509. *Pennsylvania*—Com. *v.* Crossmire, 156 Pa., 304. *Texas*—Powell *v.* State, 13 Tex. Ct. of App., 244. *Virginia*—Livingston *v.* Conn., 14 Gratt., 592. *Washington*—Ilwaco R., etc., Co. *v.* Heddrick, 1 Wash., 446. *Wisconsin*—Boyle *v.* State, 61 Wis., 440.

by choking, the opinion being formed from the finger marks on the neck. Or they may give their opinion as to which of two wounds produced death.

An experienced physician may give his opinion that deceased was dead before a certain train passed over the body, although such opinion was founded upon facts testified to by others, and not upon matters coming under his own observation.[1] In a case where it was objected that the physician who made the post-mortem examination of the deceased could not express an opinion that death resulted from concussion of the brain, unless he had opened the head and examined the brain, the court remarked: "We are aware of no law that required him to open the skull and examine the brain before he could be permitted to express such an opinion to the jury. Of course, the opinion of a medical witness in such case would have more or less weight with the jury according to the extent of the examination, the professional rank and character of the witness."[2] It has been held that a physician may give his opinion as to whether a clot of blood produced by injuries could have existed for a specified time without causing death.[3] A medical expert has been allowed to give in evidence his opinion as to whether a stillborn child would have been born alive if medical assistance had been received in time, where the testimony shows that the mother suffered more pain and mental anxiety on account of her condition than if the physician had been present.[4] Also they have been allowed to testify, in response to a hypothetical question, that death resulted from suffocation, aided by extensive injury to the brain, and that they knew of no disease which would produce death

[1] State *v.* Clark, 15 S. C., 403.
[2] Ebos *v.* State, 34 Ark., 520.
[3] State *v.* Pike, 65 Me., 111.
[4] Western Union Tel. Co. *v.* Cooper, 71 Tex., 507.

with those symptoms.[1] The reason for receiving such opinions is that it would otherwise be impossible in many cases to prove the cause and manner of death, especially in those cases where there was no one present at the time of death. In such cases the opinions of physicians and surgeons who have made a post-mortem examination, are indispensable in order to ascertain the facts and clear up the mystery.

(*f*) **On the Cause, Nature, and Symptoms of Disease.** —Physicians and surgeons are competent to give their opinion in evidence as to the cause,[2] duration,[3] and curability of disease.[4] Thus on the question of the curability of disease, a physician who had testified as to the disease from which a woman was suffering was allowed to give his opinion as to the proportion of such patients who recover.[5] Upon the question of cause he may give his opinion in evidence that malaria was brought on by stagnant water,[6] or whether pressure at the base of the brain arises from tumors or other causes,[7] or what is responsible for a contagious disease.[8] Their opinions are also received as to the probability of the recurrence of a disease,[9] and the effect upon the general health.[10] They may also

[1] People *v.* Foley, 64 Mich., 148.

[2] Eufaula *v.* Simmons, 86 Ala., 515; Hardiman *v.* Brown, 162 Mass., 585; Matterson *v.* N. Y. C. Ry. Co., 35 N. Y., 487; Kliegel *v.* Aitken, 94 Wis., 432.

[3] Bennett *v.* Fail, 26 Ala., 605; Tatum *v.* Mohr, 21 Ark., 349; Edington *v.* Ætna Life Ins. Co., 77 N. Y., 564; Jones *v.* White, 11 Humph. (Tenn.), 268; Knox *v.* Wheelock, 56 Vt., 191.

[4] New York Electric Equipment Co. *v.* Blair, 79 Fed., 896; Matteson *v.* N. Y. C. Ry. Co., 35 N. Y., 487; Griswold *v.* N. Y. Central R. R. Co., 115 N. Y., 61.

[5] Cole *v.* Lake Shore, etc., Ry. Co., 95 Mich., 77.

[6] Eufaula *v.* Simmons, 86 Ala., 515.

[7] Hardiman *v.* Brown, 162 Mass., 585.

[8] Kliegel *v.* Aitken, 94 Wis., 432.

[9] Linton *v.* Hurley, 14 Gray (Mass.), 191; Willey *v.* Portsmouth, 35 N. H., 303.

[10] Pidcock *v.* Potter, 68 Pa., 342.

testify as to the cause of the disease and the remedy for it.[1]

(*g*) **In Malpractice Cases.**—Whether a physician has attended skilfully or properly a particular case is a question on which the opinion of medical men of the same school may be received in evidence,[2] and they may state whether or not in their opinion it was in conformity with the established mode of treatment,[3] or whether an amputation has been skilfully performed.[4] Thus a physician may express the opinion that a limb was or was not as good as the average condition of such cases treated by skilful physicians.[5] It is not necessary that the opinion of a medical expert in a malpractice case should be asked upon any particular part of the treatment, but taking the whole treatment together he may be asked whether it "was proper or improper."[6] A physician who has attended a patient under the care of a brother physician may testify as to what, so far as he could judge, had been the first physician's treatment; in what respects it differed from his own; what effect, so far as he could judge, it had upon the plaintiff, and whether or not he saw any evidence that the plaintiff had been injured by his treatment.[7]

(*h*) **In Cases of Rape.**—Physicians and surgeons are called upon to testify in nearly all prosecutions for crime against nature, as they are important witnesses

[1] Schneider *v.* Manning, 121 Ill., 376; Newton *v.* State, 21 Fla., 26; McClain *v.* Brooklyn City Ry. Co., 116 N. Y., 459.

[2] Hoener *v.* Koch, 84 Ill., 408; Mayo *v.* Wright, 63 Mich., 32; Heath *v.* Glisan, 3 Or., 67; Roberts *v.* Johnson, 58 N. Y., 613; Wright *v.* Hardy, 22 Wis., 348.

[3] Twombly *v.* Leach, 11 Cush. (Mass.), 405.

[4] Tullis *v.* Rankin, 6 N. Dak., 44; Olmstead *v.* Gere, 100 Pa., 127; Wright *v.* Hardy, 22 Wis., 348.

[5] Olmstead *v.* Gere, 100 Pa. St., 127.

[6] Mayo *v.* Wright, 63 Mich., 32.

[7] Barber *v.* Merriam, 11 Allen (Mass.), 322.

in case of marks of violence being found on the body of the victim, or in case stains are found on the clothing of either party. Science claims by the use of the microscope in the investigation of stains upon the clothing, it can determine with a great degree of accuracy the guilt or innocence of persons accused of the heinous crime of rape. A case reported in Richardson's *Medical Microscopy*, 299, 300, may be of interest, and I have set it out as follows: "In a case upon which I was consulted some time since, where a young girl was said to have been violated by main force and held down for some minutes subsequently, the chemise worn on the occasion was brought to me for examination. On inspection, besides sundry small reddish spots and streaks upon the front, there were to be seen two large stains on either side of the middle of the back of the garment, each about 4 inches long by 3 inches wide, such as might occur from any fluid running down the inside of the thighs from the vulva of a female lying upon her back in a nearly horizontal position. My first duty being obviously to determine whether these reddish stains were produced by blood, the chemise was doubled over at the most highly tinted part of one spot, and the convex portion of the fold scraped lightly with a sharp scalpel over a clean slide until a small quantity of fine reddish dust was obtained. This powder was covered with thin glass, and a drop of water being applied to one edge, and a fragment of bibulous paper to the other, a current of fresh fluid was kept up for about one minute, when the specimen was examined with a power of 1200 diameters. . . . These cellular elements became more clearly visible when slightly tinted with aniline, and on measurement with the micrometer were found to average about $\frac{1}{4000}$ and $\frac{1}{3000}$ of an inch

in diameter respectively, whence I concluded that the red stains were produced by blood, probably that of a human being. . . . The main question as to the presence or absence of spermatozoa still continuing unsolved, as none had been detected among the particles of blood clot, a fragment of muslin about three-fourths of an inch long by one-eighth of an inch wide, selected from a portion where the fabric, although but little stained, was a good deal stiffened by the suspected material, was cut out with a pair of curved scissors, and, after soaking for a couple of minutes in a drop or two of weak glycerin and water, its inner surface was gently scraped and pressed with a scalpel, the visible filaments of cotton picked out with a mounted needle, the remainder covered with a very thin glass and subjected to examination under . . a power of about 2800 diameters. Several indubitable spermatozoa . . were readily detected, and proved beyond all question that spermatic fluid, mingled with blood, had caused the stains upon the chemise.

In giving testimony in prosecutions for rape a physician cannot draw conclusions. Thus where a physician has testified that from the discharge he could not tell whether the child assaulted had gonorrhea or vaginitis, as the diseases are similar, he cannot state that from the fact that the accused had gonorrhea he supposed that it was gonorrhea; for the reason that that would be assuming as proven the very thing to be proven, that the accused had had contact with the female.[1] A physician will not be allowed to answer a hypothetical question put to him, whether in his opinion the facts assumed would constitute rape, as it asks for a legal instead of

[1] Moore *v.* State, 17 Ohio St., 521.

medical knowledge.[1] A physician may be examined, however, as to whether the health and physical condition of the prosecutrix at the time of the alleged offence was such that she was capable of resisting the defendant;[2] but he cannot answer a question: "From what you know of her health and strength, in your opinion could the defendant have carnal connection with her against her will without resort to other means than has been held proper for a medical expert to state the exercise of his ordinary physical powers?"[3] It what effect a rape would have on the sexual organs of the female, and to testify to the condition of the sexual organs of the female soon after the commission of the crime.[4]

Likewise medical experts may, in a rape case, testify to the abnormal condition of the private parts of the person alleged to have been assaulted, and to the causes which would produce such condition.[5]

In our climate the age of puberty is frequently earlier than in England or the more northern States of the Union. We have among us almost every variety of the races of men. To adopt the rule as to the age of puberty which exists in England and more northern countries, where the climate, conditions, and habits of the people are different and the population mostly of one race, would not only be a departure from reason and sense, but would be in violation of the statute itself, by withdrawing persons who had actually violated it from punishment. In England they do not propose to permit guilty persons to escape, but assume the physical impossibility of an

[1] People *v.* Brown, 53 Mich., 53; 19 N. W., 172.
[2] State *v.* Smith, Phillips (N. C.), Law, 302.
[3] Wooden *v.* People, 1 Parker Cr. Cas., 464.
[4] Noonan *v.* State, 55 Mo., 258.
[5] Commonwealth *v.* Lynes, 142 Mass., 577.

infant under the age of fourteen years being capable of being guilty. Here we know that many infants under fourteen are capable of being guilty, but that a majority are not capable under that age. Hence we are compelled to suit the rules of law to the fact, as the rule itself has no authority but in fact. Modified, then, to our own circumstances and conditions, the law is this: An infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it, but that presumption may be rebutted by proof that he has arrived at the age of puberty and is capable of emission and consummating the crime.[1]

Physicians may give in evidence their opinions as to whether penetration has occurred so as to constitute rape;[2] also whether pregnancy is likely to occur as a result of rape.[3] A medical expert is incompetent to give his opinion as to whether a rape could have been committed in the manner described, nor whether a woman would swoon or be nerved with more than usual strength.[4]

(*i*) **In Prosecutions for Seduction.**—The opinion of medical experts is admissible in a prosecution for seduction, where it is to the effect that sexual intercourse under the circumstances described by the complainant, *i. e.*, in a buggy, was highly improbable, if not impossible, and also as to the pain and suffering the complainant would have experienced had such an act taken place.[5]

(*j*) **In Cases of Abortion.**—The opinions of medical experts are received upon the question of whether

[1] Williams *v.* State, 14 Ohio, 222.
[2] State *v.* Smith, Phil. L. (61 N. Car.), 302; Proper *v.* State, 85 Wis., 615.
[3] Young *v.* Johnson, 123 New York, 226; State *v.* Knapp, 45 N. H., 148
[4] Cook *v.* State, 24 N. J. L., 843.
[5] People *v.* Clark, 33 Mich., 112.

an abortion has been performed,[1] and as to whether the means employed were mechanical means,[2] or the administering of drugs.[3]

If the former course has been followed, the witness may state that the wounds, judging from their character and situation, were such as might have been self-inflicted,[4] and that certain surgical instruments found in the house of the defendant, indicted for an abortion, were adapted to produce an abortion.[5]

Physicians may say whether certain medicines are known as abortives and whether a specified quantity administered at certain times would produce an abortion,[6] and whether traces would exist under certain circumstances, even though no proof of such circumstances had been made.[7]

(*k*) **In Cases of Miscarriage.**—A physician's opinion is receivable in evidence concerning the cause of a miscarriage, whether it was caused by injuries and exposure,[8] accident,[9] or whether the result was produced by some inherent physical difficulty.[10]

(*l*) **In Cases Involving the Question of Pregnancy.**—Physicians are permitted to express an opinion on the question of pregnancy.[11] A medical witness has been allowed to testify that pregnancy was just as

[1] State *v.* Lee, 35 Conn., 265; Hank *v.* State, 148 Ind., 238; State *v.* Smith, 32 Me., 370; Com. *v.* Thompson, 159 Mass., 56; State *v.* Wood, 53 N. H., 484, 495; State *v.* Glass, 5 Or., 73.

[2] State *v.* Lee, 65 Conn., 265; State *v.* Wood, 53 N. H., 484.

[3] Bathrick *v.* Detroit Post, etc., Co., 50 Mich., 629.

[4] State *v.* Lee, 65 Conn., 265.

[5] Com. *v.* Brown, 121 Mass., 69.

[6] Williams *v.* State, 19 S. W., 897.

[7] Bathrick *v.* Detroit Post, etc., Co., 50 Mich., 629.

[8] McKeon *v.* Chicago, etc., Ry. Co., 94 Wis., 477.

[9] State *v.* Ginger, 80 Iowa, 574; Benjamin *v.* Holyoke St. R. Co., 160 Mass., 3.

[10] Hank *v.* State, 148 Ind., 238.

[11] State *v.* Wood, 53 N. H., 484.

likely to take place in case of rape as in the case of a voluntary sexual connection.[1]

(*m*) **In Cases Involving Premature Birth.**—Physicians,[2] and women who have had experience in childbirth, and, as such, been in attendance at premature births, may testify as experts to their opinion as to whether the birth of a child was premature.[3] A physician may testify as to the age of a child.[4]

(*n*) **In the Detection of Poisons.**—A physician or surgeon is entitled to testify as to the effect of certain poisons on the human system.[5] For example, he may testify as to the symptoms of strychnine in the human system;[6] and state that in his opinion death was caused by the administration of arsenic.[7] It has been held that a physician cannot testify as an expert as to the effects of poison upon the system until it is first shown that he is qualified as such from study and experience in medicine.[8] Although the opinions of practising physicians who are not professional chemists have been received as to the analysis of the stomach, and the tests usually applied for detecting poison in such cases, their opinions are entitled to less weight than those given by practical chemists.[9] The right of a physician to testify as to the result of a chemical analysis has been recognized,[10] but the mere fact that he is a physician does not qualify him to give expert evidence, on the question of whether or not the contents of the human stomach, as revealed by a post-mortem examination, contains arsenic.[11]

[1] State *v.* Knapp, 45 N. H., 148; Young *v.* Johnson, 123 N. Y., 226.
[2] Young *v.* Makepeace, 103 Mass., 50. [3] Mason *v.* Fuller, 45 Vt., 29.
[4] People *v.* Johnson, 70 Ill. App., 634.
[5] Mitchell *v.* State, 58 Ala., 418; State *v.* Terrill, 12 Rich. (S. C.), 321.
[6] Polk *v.* State, 36 Ark., 117. [7] Mitchell *v.* State, 58 Ala., 417.
[8] Polk *v.* State, 36 Ark., 117. [9] State *v.* Hinkle, 6 Ia., 380.
[10] State *v.* Hinkle, 6 Iowa, 380. [11] State *v.* Cole, 63 Iowa, 695.

(*o*) **On the Effects of Drugs.**—Physicians may give their opinion on the effect of a certain quantity of a particular drug on one who takes it.[1]

(*p*) **As to Mental Condition.**—(1) *In General.*—It seems to be conceded that the opinions of medical men on the question of insanity are evidence. Such opinions may be stated even on the facts proved, though the physician may not have seen the patient.[2]

(2) *Qualifications of Experts on Insanity.*—A general knowledge as a medical man at least is required to enable one to testify as an expert on questions pertaining to insanity.[3]

Physicians in general practice who have been practising their profession for a number of years are experts upon the subject of sanity or insanity and it is not necessary that they should have made the particular disease involved in the inquiry a specialty to render their testimony admissible as that of an expert.[4] On the other hand, however, we have a few

[1] Hoard *v.* Peck, 56 Barb. (N. Y.), 202; State *v.* Perry, 41 W. Va., 641; Mutual Life Ins. Co. *v.* Tillman, 84 Tex., 31.

[2] *United States*—Davis *v.* United States, 165 U. S., 373. *Alabama*—McAllister *v.* State, 17 Ala., 434. *California*—People *v.* Worthington, 105 Cal., 166. *Colorado*—Jordon *v.* People, 19 Colo., 417. *Connecticut*—Barber's Appeal, 63 Conn., 393. *Delaware*—State *v.* Windsor, 5 Harr. (Del.), 512. *Georgia*—Potts *v.* House, 6 Ga., 324. *Illinois*—Schneider *v.* Manning, 121 Ill., 376. *Indiana*—Guetig *v.* State, 66 Ind., 94. *Iowa*—Bever *v.* Spangler, 93 Ia., 576. *Kentucky*—Montgomery *v.* Com., 88 Ky., 509. *Maine*—St. George *v.* Biddeford, 76 Me., 593. *Maryland*—Crockett *v.* Davis, 81 Md., 134. *Massachusetts*—Com. *v.* Rogers, 7 Met. (Mass.), 500. *Michigan*—Rivard *v.* Rivard, 109 Mich., 98. *Missouri*—State *v.* Welsor, 117 Mo., 570. *New York*—People *v.* Hoch, 150 N. Y., 291. *North Carolina*—State *v.* Matthews, 66 N. C., 106. *Pennsylvania*—Com. *v.* Buccieri, 153 Pa., 535. *South Carolina*—State *v.* Leeham, 2 S. D., 171. *Texas*—Pigg *v.* State, 43 Tex., 108. *Vermont*—Foster *v.* Dickerson, 64 Vt., 233.

[3] State *v.* Crisp, 126 Mo., 605; Com. *v.* Brayman, 136 Mass., 438.

[4] Davis *v.* State, 35 Ind., 496; State *v.* Larkins (Idaho), 47 Pac., 945; Baxter *v.* Reddick, 7 Kan., 143; Phelps *v.* Com., 17 Ky. L. Rep., 706; Nash *v.* Hunt, 116 Mass., 237; Flynt *v.* Bodenhamer, 80 N. C., 205; Hathaway *v.* National Life Ins. Co., 48 Vt., 336.

cases holding that to render an opinion admissible in evidence on the question of sanity or insanity it is essential that the witness should be an expert on the general subject under consideration.[1] Whether an expert witness on the question of mental soundness is competent or not to testify as an expert is a question for the court.[2] It is not affected by the witness' own opinion as to his own qualifications or incompetency.[3]

(3) *Weight of Opinions as to Sanity.*—While the opinions of medical experts upon an issue of sanity or insanity should be considered by the jury in connection with all the other evidence in the case, they are not bound to act upon them to the exclusion of other testimony.[4] Their testimony stands upon substantially the same footing as that of any other witness as to credibility.[5] The opinion of an expert witness as to the sanity of another is a fact bearing upon that question, the proper weight of which falls within the province of the jury to determine.[6] The opinion of professional men on the question of sanity or insanity is frequently entitled, however, to great weight;[7] particularly where they had special opportunities for observation,[8] or where they attended him and were with him constantly during the time the weakness of the mind was charged.[9] But where there is considerable conflict between the opinions of expert

[1] Russell *v.* State, 53 Miss., 367; Reed *v.* State, 62 Miss., 405; Hutchins *v.* Ford, 82 Me., 363.

[2] Davis *v.* State, 35 Ind., 496; Fayette *v.* Chesterville, 77 Me., 28; Boardman *v.* Woodman, 47 N. H., 120; Flynt *v.* Bodenhamer, 80 N. C., 205.

[3] Boardman *v.* Woodman, 47 N. H., 120.

[4] Geutig *v.* State, 66 Ind., 94; People *v.* Finley, 38 Mich., 482.

[5] Eggers *v.* Eggers, 57 Ind., 461.

[6] Kempsey *v.* McGinnis, 21 Mich., 123; Goodwin *v.* State, 96 Ind., 550.

[7] Choice *v.* State, 31 Ga., 481; Com. *v.* Rogers, 7 Met. (Mass.), 500; Paunell *v.* Com., 86 Pa., 260.

[8] Montague *v.* Allen, 78 Va., 592.

[9] Jarrett *v.* Jarrett, 11 W. Va., 584.

witnesses on the question of testamentary capacity, their opinions are entitled to but little, if any, weight.[1] Where there is a disagreement in the testimony of expert witnesses in a prosecution for homicide on the question of the sanity of the accused it is not error for the court to refuse to instruct the jury that the opinions of those who had not had particular experience on the subject should be disregarded, where nothing is said to the jury calculated to mislead them.[2] The rule has been laid down that on questions of sanity or insanity proof made by expert witnesses who have devoted their time and attention to cases of mental derangement is of much greater value than that of other persons who have no scientific or experimental knowledge on the subject, and who can only speak from observation from outward signs and appearances.[3] In marshaling evidence of insanity the greater weight should be given to the judgment of medical experts and those closely associated with the party claimed to be insane than to other witnesses; and, next to this, great respect should be accorded to lay witnesses whose intercourse and public relations with men enable them from experience and observation to form an opinion of men's motives from their speech and actions.[4]

(*q*) **Bias of Experts.**—The mere fact that an expert requires pay for his opinions does not discredit him. "Men who have informed themselves by long and patient study and observation in any particular department of art or science cannot be compelled to come into court and give their opinions as experts on controverted questions for the ordinary witness

[1] Jamison *v.* Jamison, 3 Houst. (Del.), 108.
[2] People *v.* Montgomery, 13 Abb. Pr., N. S., 207.
[3] Watson *v.* Anderson, 13 Ala., 203; State *v.* Reidell, 9 Houst. (Del.), 470.
[4] Com. Helmbold, *v.* Kirkbride, 11 Phila., 427.

fee. They have the same right to charge for their advice and opinions as other professional men."[1] Judges have very frequently disparaged their testimony, commencing with Lord Campbell, who said that "hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked,"[2] and extending to a New York court of appeals decision, where it was said: "Expert evidence, so-called, or, in other words, evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor . . . He [the expert] comes on the stand to swear in favor of the party calling him, and it may be said he always justifies by his works the faith that has been placed in him."[3] Said the same court in another case: "Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted."[4] The Supreme Court of Mississippi declares that it "ought to be received and weighed cautiously by the jury."[5]

[1] Harvey *v.* Evansville Steam Packet Co., Fed. Cas., No. 6, 179.
[2] The Tracy Peerage, 10 Cl. & F., 154, 190.
[3] Roberts *v.* New York El. R. Co., 128 N. Y., 455.
[4] Ferguson *v.* Hubbell, 97 N. Y., 507, 514, per Earl, J.
[5] Moye *v.* Herndon, 30 Miss., 118.

The Supreme Court of Ohio say: "Medical testimony is of too much importance to be disregarded. When delivered with caution and without bias in favor of each party, or in aid of some speculation and favorite theory, it becomes a salutary means of preventing even intelligent juries from following a popular prejudice, and deciding a cause on inconsistent and unsound principles. But it should be given with great care and received with the utmost caution, and, like the opinions of neighbors and acquaintances, should be regarded as of little weight if not well sustained by reason and facts that admit of no misconstructions, and supported by authority of acknowledged credit."[1]

The Supreme Court of South Carolina has said that "all testimony founded upon opinion merely is weak and uncertain and should in every case be weighed with great caution."[2] The opinions of physicians given in answer to hypothetical questions are not to be rejected or accepted by the jury at will, but are to be weighed and considered the same as any other evidence. After weighing such testimony the jury may disbelieve it when improbable, discredited, or disproved, or when they believe that the witness testified falsely or mistakenly.[3]

An examination of the cases shows many different theories as to the weight to be given the testimony of medical experts. The view taken by the Circuit Court of the United States seems to us to be the proper view. The jury in that case were charged as follows: "The value, however, of the opinion of experts differs largely in degree in different cases. It is of first im-

[1] Clark *v.* State, 12 Ohio, 483.
[2] Benedict *v.* Flanigan, 18 S. C., 506.
[3] Lubbee *v.* Hilgert, 135 N. Y. App. Div., 227.

portance that the facts upon which they are founded be satisfactorily established. In the present case it does not occur to us that there was any dispute as to the facts in relation to which the expert spoke. It is next of importance that the integrity and skill of the witness be known. I may add here, that no question is made of the competency of the witness who has testified here or of the confidence due to his integrity. But this is not all. Where the expert states precise facts in science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts stated, his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated, his opinion is of less importance, because it states only a probability. When the opinion is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury.

"Testimony of experts of this latter description, and especially where the speculative and theoretical character of the testimony is illustrated by opinions of experts on both sides of the question is justly the subject of remark, and has often been condemned by judges as of slight value. Like observations apply in a greater or lesser degree to the opinions of witnesses who are employed for a purpose, and paid for their services, who are brought to testify as witnesses for their employers. This last observation has no pertinency to the present case, and is only made for the purpose of explaining the reason why testimony of this sort has been the subject sometimes of such comments as have been made in your hearing. This condemnation is not always applicable. Often

it would be unjust. Where an expert of integrity and skill states conclusions which are the necessary or even the usual results of the facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited. But, after all, the question of fact in issue is not for the expert to decide. The question of fact in this case is neither for the expert nor for the court. It is for you to decide, upon your sound judgment, under the oaths which you have taken, to render a verdict according to the whole of the evidence submitted to you for consideration."[1]

(*r*) **Expert's Fees.**—While a physician and surgeon may be required to attend as a witness, and to testify to facts as other witnesses, and without other compensation than that provided by the law for other witnesses, yet he cannot be required to testify as to his professional opinion, over his objection to do so without the compensation of a professional fee; and his refusal to so testify unless so compensated is not a contempt. For "if physicians or surgeons can be compelled to render professional services by giving their opinions on the trial of criminal causes, without compensation, then an eminent physician or surgeon may be compelled to go to any part of the State, at any and all times, to render such service without other compensation than such as he may recover as ordinary witness fees, from the defendant in the prosecution, depending upon his conviction and ability to pay. This, under the general principles of law and the constitution of the State, he cannot be compelled to do. If he knows facts pertinent to the case to be tried, he must attend and testify as any other witness. In respect to facts within his knowledge, his qualifications as a physician and surgeon are entirely unimportant. Not so, how-

[1] Gay *v.* Union Mut. L. Ins. Co., 9 Blatch, 142.

ever, in respect to his professional opinions. In giving them he is performing a particular service which cannot be demanded of him without compensation."[1] In the Indiana case it was said: "The position of a medical witness testifying as an expert is much more like that of a lawyer than that of an ordinary witness testifying to facts. The purpose of his service is not to prove facts in the cause but to aid the court or jury in arriving at a proper conclusion from facts otherwise proved. The property which an attorney or physician may have in his professional knowledge, if it is to be regarded in the light of property, may not be of a tangible corporeal character; it may be neither goods nor chattels, lands nor tenements, but it may nevertheless be property. A party who has a copyright in a book has a property which consists not in the right to the book merely, but in the exclusive right of multiplying copies thereof."[2]

In a New York case the court said: "There is a wide distinction between a witness called to depose to a matter of opinion depending upon his skill in a particular profession or trade and a witness who is called to depose to facts which he saw. When he has facts within his knowledge, the public have a right to those facts, to be used by a court of justice in civil or criminal trials; but the skill and professional experience of a man are so far his individual capital and property that he cannot be compelled to bestow them gratuitously upon any party; that the public, no more than a private person, has a right to extort services from him in the line of his profession or trade without adequate compensation."[3]

[1] Buchman *v.* State, 95 Ind., 1; Ex parte Clark, 104 Mass., 537; State *v.* Dollar, 66 N. C., 626; In re Roelker, 1 Sprague, 276; United States *v.* Howe, 12 Cent. Law Jour., 193.

[2] Buchman *v.* State, 59 Ind., 1.

[3] People *v.* Montgomery, 13 Abb. Pr. (N. Y.), N. S., 207.

In opposition to the rule we have laid down as to what seems to us to be the reasonable rule and the one adopted by the federal courts, is that adopted by a number of States and which holds that a professional witness who attends in obedience to an ordinary subpena may be compelled to express his opinion on hypothetical questions or on general medical or toxicological questions as an ordinary witness is compelled to testify on questions of fact within his knowledge, and for the same statutory fees.[1]

The courts holding this view base it upon the same principle which justifies the bringing of the mechanic from his workshop, the merchant from his storehouses, the broker from 'change, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession. The statute of many States have provided that a witness who is called as an expert cannot be compelled to testify without payment of extra compensation, while the statutes of other States provide for exactly the contrary. So that the safe course to follow is to ascertain what one's own State legislature has said or done on the subject.

In any event if a physician wishes to receive extra compensation, he should demand the same before answering the questions put to him; but in order to entitle a medical expert to fees he must show that he was called as such, and to testify to an opinion founded on his special study and experience.[2]

It is universal law that the witness be tendered in advance of the trial, and at the time of the serving

[1] Ex parte Dement, 53 Ala., 389; Flinn *v.* Prairie Co., 60 Ark., 204; Larimer County Comrs. *v.* Lee, 3 Colo. App., 177; Wright *v.* People, 112 Ills., 540; State *v.* Teipner, 36 Minn., 532, 537; Com. *v.* Higgins, 5 Kulp (Pa.), 269; Summers *v.* State, 5 Tex. App., 374.

[2] Snyder *v.* Iowa City, 40 Iowa, 646.

of the subpena, the amount of the expense to which he will be put in attending the trial, and on demand of such payment, at the time of service of process, and refusal, the witness is not bound to attend. If, however, he does not demand his expenses when served with process, but voluntarily attends the trial, he cannot refuse to testify when called to the stand, on the ground that his expenses have not been paid.

The law of tender in civil suits differs in the different States, but, as a general rule, in criminal cases neither the State nor the defence is required to tender the witness' expenses in advance.

A physician called as an expert who testifies under a contract that he shall receive a certain per cent. of the judgment obtained by the plaintiff, cannot recover for the same, as such an agreement is illegal from its manifest tendency to prevent justice.[1]

(*s*) **Hypothetical Questions.**—A hypothetical question is one propounded to a witness detailing what the questioner claims are the facts proved in the case and requesting the opinion of the witness as to the probable result of those facts or their effect upon the person under investigation.[2]

The advantage of the hypothetical form of question is that it gets before the jury exactly the facts upon which the opinion is founded. Where an expert witness has heard the evidence, it might be thought that it would be simpler to ask his opinion upon the facts as proved; but this would be objectionable, for the reason that the jury alone are to determine what facts are proved. To leave it to the witness to do this, and to express his opinion upon such facts as he may deem proved, is objectionable, for the reason that in the

[1] Laffin *v.* Billington, 86 Supp. (N. Y.), 267.
[2] Peterson *v.* R. R. Co., 38 Minn., 512.

minds of the jury a different state of facts may seem to have been proved from the facts which are in the mind of the witness. Under these circumstances the jury cannot tell what weight the opinion is entitled to. The statement of the facts constituting the hypothetical question must comprise those facts upon which an opinion is wanted, stated as the party putting the question conceives them to have been proved by the evidence.[1] The nearer they come to the facts as they appear to the jury, the greater the weight which the witness' opinion will have.

It is not necessary that the question include the substance of all the testimony given.[2] All that is required is that the question shall be a fair statement of the salient facts upon which an opinion is wanted. The prevailing doctrine is that the witness cannot be asked his opinion upon the evidence in the case as he has heard it given. This would leave to him the determination of what facts he would consider proved. On these facts he would base his opinion, and give what in substance would be a verdict on the evidence, which would be highly objectionable. Not only must a hypothetical question put to a medical expert be based upon the facts in evidence, but it must not give a false coloring to those facts by unduly emphasizing some of them or not mentioning others.[3]

The form of the hypothetical question has been set forth by the Supreme Court of Vermont in an opinion, from which we quote: "A study of the various cases will show that the form of the question is modified and shaped by the courts; whether it states facts, or

[1] People *v.* Tuczkewitz, 149 N. Y., 240; 43 N. E., 548; Abbot *v.* Heath, 84 Wis., 314; 54 N. W., 574.

[2] Stearns *v.* Field, 90 N. Y., 640.

[3] Miller *v.* Leib, 109 Md., 414; 72 Atl., 466.

puts facts hypothetically, or refers to the testimony of witnesses as being true, so as to give the witness no occasion or opportunity to decide upon the evidence, or mingle his own opinion of the facts, as shown by the evidence, with the facts upon which he is to express a professional opinion. This is the important point, and to secure this various forms of inquiry have been adopted. Hypothetical questions may be so put as to require the witness to decide upon the evidence, to determine which side preponderates, and to find conclusions from the evidence, in order to reconcile conflicting facts. Such questions, though hypothetical, are as clearly improper as if they directly sought the opinion of the witness on the merits of the case. Hence in framing such questions, care should be taken not to involve so much, or so many facts in them, that the witness will be obliged in his own mind to settle other disputed facts in order to give his answer."[1] For instance, it is improper to ask a medical expert whether a person possessed sufficient mental capacity to enable him to make a will.[2] An opinion of an expert witness cannot be based upon opinions expressed by other experts. Facts and not opinions must be assumed in the questions. If it were otherwise, opinions might be built upon opinions of experts and the substantial facts driven out of the case.[3] As was said in a Maryland case: "Now, while an expert may give his opinion upon facts assumed to have been established, it would be against every rule of principle of evidence to allow him to state his opinion upon the conclusions and inferences of other witnesses."[4]

[1] Fairchild *v.* Bascomb, 35 Vt., 415.

[2] Farrell *v.* Brenner, 32 Mo., 328; May *v.* Bradlee, 127 Mass., 414; White *v.* Bailey, 10 Mich., 155.

[3] Louisville, etc., R. Co. *v.* Falvey, 104 Ind., 409; Preston *v.* Ocean S. S. Co., 33 App. Div. (N. Y.), 193.

[4] Williams *v.* State, 64 Md., 384.

It is the duty of the court to determine whether a question put to an expert witness is one proper to be put, and, when put, to see that it is in such shape as to present the facts upon which it is founded clearly and intelligibly, and, if necessary, to have it reduced to writing, to enable the witness to answer intelligently and the opposite counsel to cross-examine or offer testimony to meet it; and so long as it contains no irrelevant matter not proper to support an opinion or no statements of facts not in evidence or assumed to exist for the purpose of the question it may be as long as counsel desire to make it.[1]

The hypothetical question submitted in the Thaw trial by the prosecution contained fifteen thousand words. A hypothetical question in one case, in which the issue was as to the mental condition of the testator, contained twenty thousand words, and was answered "I don't know." As an interesting illustration of the hypothetical question we have taken the liberty to set out the one propounded by the defence to the experts in the trial of Guiteau, that propounded by District Attorney Jerome during the Thaw trial to six different insanity experts being of too great length to permit of its reproduction here.

"Q. Assume it to be a fact that there was strong hereditary taint of insanity in the blood of the prisoner at the bar; also, that at about the age of thirty-five years his own mind was so much deranged that he was a fit subject to be sent to an insane asylum; also, that at different times from that date during the next succeeding five years he manifested such decided symptoms of insanity, without simulation, that many different persons conversing with him, and observing his conduct, believed him to be insane; also, that

[1] Deig Exr. *v.* Morehead, 110 Ind., 451, 11 N. E., 458.

during the month of June, 1881, at about the expiration of said term of five years, he honestly became dominated by the idea that he was inspired of God to remove by death the President of the United States; also, that he committed the act of shooting the President under what he believed to be a divine command, which he was not at liberty to disobey, and which belief amounted to a conviction that controlled his conscience and overpowered his will as to that act, so that he could not resist the mental pressure upon him; also, that immediately after the shooting he appeared calm and as one relieved by the performance of a great duty; also, that there was no other adequate motive for the act than the conviction that he was executing the divine will for the good of his country. Assuming all these propositions to be true, state whether, in your opinion, the prisoner was sane or insane at the time of shooting President Garfield?

"A. He was unquestionably insane, in my opinion." The jury thought otherwise, however, and he was, as we all know, convicted and hanged.

(*t*) **Reëxamination.**—After a witness has been cross-examined by opposing counsel, he may be reëxamined by the attorney who called him and correct any false impressions he may have left with the jury by reason of his cross-examination.

2. PRIVILEGED COMMUNICATIONS

(*a*) **In General.**—Communications from a patient to his physician were not privileged at common law;[1] but now most States have enacted statutes forbidding the disclosure in evidence, against the will of the

[1] Barber *v.* Merriam, 11 Allen, 322; 165 N. Y., 159.

patient, of information acquired by physicians in their professional capacity.[1]

These statutes have been enacted on the ground of public policy, for the purpose of facilitating and making safe, full, and confidential disclosure by patient to physician of all facts, circumstances, and symptoms, untrammeled by apprehension of their subsequent enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patients.[2] The words "*privileged communications*" are sometimes used in a sense radically different than that in which they are used here. In libel and slander actions a defendant may plead that the words spoken or written were privileged; that is, that they were uttered or spoken in good faith upon some subject matter in which the party communicating has an interest, or in reference to which he has a duty, and spoken or written to a person having a corresponding interest or duty, and if this is true he will not be liable in damages, although otherwise the words would be slanderous.

Where a physician upon an examination of an unmarried female patient found, as he believed, that she was pregnant, his communication of that fact to others than those reasonably entitled to know is not a privileged communication, and if false will render him liable in damages.[3] Where it is the prescribed duty of a physician to report upon any matter, then what he may report without malice and with a reasonable belief in its truth is privileged. As where a law requires every physician to report to the board of

[1] See the statutes of the several States.

[2] Boyle *v.* N. W. Mut. R. Asso., 95 Wis., 312; In re Will of Bruendl, 102 Wis., 45.

[3] Alpin *v.* Morton, 21 Ohio St., 536.

health all cases of smallpox coming to his knowledge and he erroneously but without malice reports his patient so diseased, whereby she is taken from her home to the smallpox hospital, he will not be liable to an action at the suit of the patient.[1]

(*b*) **Necessity of Existence of Relation of Physician and Patient.**—(1) *In General.*—It is conceded that in order that the knowledge acquired by a physician in the sick chamber should be protected, the relations of physician and surgeon must exist.[2] This proposition of law seems simple enough and we would be tempted to leave it without more discussion, but we know you will be asking yourselves, When does the relationship of physician and patient exist so as to make the information gained by the former privileged. To give some working basis to determine this question for yourselves we will set out the facts in several cases, where this question has been determined by the courts. It has been held that communications to a physician sent to a woman by the public prosecutor after discovering that an abortion has been committed on her are privileged when she accepts his services as a physician and he renders them as such.[3] On the same ground it has been held that where a defendant in a suit for personal injuries sends his physician to the plaintiff to make an examination for the purpose of testifying as to the plaintiff's condition, and the physician undertakes to treat the plaintiff, the physician is incapable of disclosing the information thus obtained.[4] Professional treatment by a physician

[1] Brown *v.* Purdy, 54 Sup. Ct. (22 J. & S.), 109.

[2] Clark *v.* State, 8 Kan. App., 782; Weitz *v.* The Mound City Ry. Co., 53 Mo. App., 39; People *v.* Murphy, 101 N. Y., 126; People *v.* Koerner, 154 N. Y., 355.

[3] People *v.* Murphy, 101 N. Y., 128.

[4] Weitz *v.* Mound City Ry. Co., 53 Mo. App., 39.

against the protest of a patient who is sick unto death is in fact treated by a physician as a patient.[1]

(2) *Necessity of Person Consulted being a Physician.* —The confidence which is protected is that only which is given to a professional physician during a consultation with a view to a curative treatment; for it is that relation only which the law desires to facilitate.

Hence the person consulted must be a professional physician in the usual sense of the word. This does not include a veterinary surgeon; nor a pharmacist; nor a dentist.[2] Although the modern recognition of dental science as strictly a branch of medical science might here have justified the opposite conclusion.

A practitioner of any branch or school of medical science, recognized as such by the reputable medical profession, is included; some of the statutes define the privileged class as "licensed" practitioners. A surgeon is in any case within the definition. How far the class should be extended in these days of pretensions and successful quackery may become difficult to determine. The fact that a duly licensed physician has failed to register does not prevent the information from being privileged.[3]

(3) *Necessity of Physician Acting Professionally.*— The consultation with a professional physician must be had in his professional character at the time. A consultation, therefore, for some purpose other than that of ultimate curative or alleviate treatment is not privileged; nor is a communication made at some time when the professional relation is not pending. An

[1] Meyer *v.* Knights of Pythias, 178 N. Y., 64.

[2] Hendershot *v.* Tel. Co., 106 Iowa, 529; 76 N. W., 828; Brown *v.* R. Co., 66 Mo., 597; People *v.* De France, 104 Mich., 563; 62 N. W., 709; Wiel *v.* Cowles, 45 Hun. (N. Y.), 307.

[3] McGillicuddy *v.* Farmers' L. & T. Co., 26 Mis. (N. Y.), 55.

autopsy after decease is of course not privileged.[1] A physician acts in a professional capacity when after examining a patient he decides that neither medicine nor advice are needed, and therefore gives neither.[2]

Any information which is necessary to enable a physician who is treating a patient sick unto death, but against his will, to act as such physician is acquired "in attending a patient in a professional capacity" and is protected from disclosure.[3] Where a physician attends for consultation by request of another physician, he attends in a professional capacity.[4] A physician may testify as to facts in regard to a testator's mental capacity, learned or observed by him in a conversation with him, after the services were rendered, when he called upon him to collect his bill, as the call was in relation to a financial matter, and in no manner akin to one made in the course of professional business.[5] When a physician is sent by a prosecuting officer to make a report upon the sanity of a prisoner, if he does not treat or prescribe for the subject the statements of the latter are not privileged.[6] Even though a physician is sent for the sole purpose of examining as to sanity, if he prescribes for the prisoner during the visit, the relation of physician and patient is thereby created and the disclosures made are within the statute.[7] In a New York case it was held that the fact that the physician was selected and sent by

[1] Bower *v.* Bower, 142 Ind., 194; Herries *v.* Waterloo, 114 Ia., 374; Harrison *v.* R. Co., 116 Cal., 156; 47 Pac., 1019; People *v.* Austin, 199 N. Y., 446.

[2] Grattan *v.* Met. L. Ins. Co., 24 Hun., 43.

[3] Meyer *v.* Knights of Pythias, 178 N. Y., 64.

[4] Renihan *v.* Dennin, 103 N. Y., 573.

[5] Bower *v.* Bower, 142 Ind., 194.

[6] People *v.* Sliney, 137 N. Y., 570.

[7] Freel *v.* Market St. C. Ry. Co., 97 Cal., 40; Colorado Fuel and Iron Co. *v.* Cummings, 80 Colo. App., 541; Weitz *v.* Mound City Ry. Co., 53 Mo. App., 39.

the district attorney to attend the patient, after the commission of a crime against her person, did not affect the question of privilege.[1] A physician who treats a patient for injuries received from a fall is incompetent to testify to a tuberculous condition of the knee which necessitated a subsequent amputation of the patient's leg.[2] The attending physician of an assured is incompetent to testify as to facts within his knowledge because of the confidential relation existing between him and his patient, and his partner is also incompetent to testify as to information secured when the assured was in consultation with the other in the office of the firm.[3] The law governing the relations of physician and patient does not apply where one insured under an accident policy is examined by the physician of the insurer as authorized by the policy.[4]

(*c*) **What Matters are Privileged.**—(1) *In General.*—If the knowledge is acquired while he is professionally attending the patient the physician can make no disclosure. This is true whether the knowledge is communicated by the words of the patient or is gained by observation, or is the result of a professional examination. The law forbids the physician from disclosing what he learns in the sick room no matter by what method he acquires his knowledge.[5]

Thus whenever an injured party consults a physician as physician, and discloses to him his physical condition, and thus enables him to obtain information which as an ordinary person he would not have obtained, such physician is prohibited from testifying

[1] People *v.* Murphy, 101 N. Y., 126.
[2] Smart *v.* Kansas City (Mo.), 1; 105 S. W., 709.
[3] The Ætna Life Insurance Co. *v.* Deming, 123 Ind., 384.
[4] Tompkins *v.* Pacific Mut. Life Ins. Co., 53 W. Va., 479.
[5] Heuston *v.* Simpson, 115 Ind., 62; Williams *v.* Johnson, 112 Ind., 273.

with reference to the knowledge thus obtained, except with the consent of the injured party.[1]

(2) *Health of Patient.*—A physician may testify as to the health of his patient.[2] He will not be allowed to testify as to his patient's previous state of health where his only knowledge is acquired from an inspection of and conversation with the patient as his physician.[3]

(3) *Nature of Ailment.*—A physician cannot testify as to the nature of the disease with which the patient was afflicted or whether he had advised the patient of its nature.[4]

(4) *Prescriptions and Certificates.*—The prescriptions of a physician have been held inadmissible in evidence when it has been shown that the patient was suffering from one disease only during the time of his treatment by such physician.[5] *The death certificates* made by physicians and filed, pursuant to law, with the health departments, are inadmissible to prove the cause of death,[6] and the original certificate, as to the cause of death of certain relatives of the insured filed by the physician in attendance during their last illness, with a city board of health is inadmissible in an action upon a policy of life insurance defended upon the ground of warranty that such relatives had not died of consumption.[7] A physician examined as a judgment debtor in supplementary proceedings cannot be com-

[1] Doran *v.* C. R. & Marion City Ry. Co., 117 Ia., 442.

[2] Metropolitan Life Ins. Co. *v.* Howle, 68 Ohio St., 614.

[3] Barker *v.* Cunard Steamship Co., 91 Hun., 498.

[4] Nelson *v.* Nederland Life Ins. Co., 110 Ia., 600; Lamminian *v.* Citizens' Street R. Co., 112 Mich., 602; Briggs *v.* Briggs, 20 Mich., 34.

[5] Nelson *v.* Nederland Life Ins. Co., 110 Ia., 600.

[6] Robinson *v.* Supreme Commandery, Order of Golden Cross, 77 App. Div., 215; Buffalo Loan, Trust & Safe Deposit Co. *v.* Knights Templar & Masonic Mut. Aid Assoc., 126 N. Y., 450; 27 N. E., 942; Sovereign Camp of Woodmen of the World *v.* Grandon, 89 N. W., 448.

[7] Davis *v.* Supreme Lodge, Knights of Honor, 165 N. Y., 159; 58 N. E., 891.

pelled to deliver to the receiver his original books of account containing confidential communications received in the course of his attendance upon his patients.[1]

(5) *Hospital Records as Privileged Communications.*—An attending physician of a hospital who is keeper of and has charge of the records of the institution which are required to be kept by ordinance, cannot testify as to the diagnosis of a patient's case as shown by such physician's record.[2]

It was held in a case where an insurance company sought to introduce in evidence, in an action against it to recover upon a policy, the register of the patients, kept at a hospital, with the entries relating to the deceased, and made by the superintendent of the hospital in charge in the usual course of business at the hospital, and which showed when the patient entered and departed and the nature of the disease, that the evidence could not be admitted, as the information from which the entries were made was furnished by a physician in charge of the case, after he had had an opportunity to observe the case long enough and knew sufficiently about the patient to determine the disease, the court saying: "To permit these entries to be introduced in evidence was to disregard in a very noticeable manner the rule forbidding the introduction of hearsay testimony as well as the spirit of the statute which prohibits the examination of a physician as to certain matters without the consent of his patient . . . although this last objection does not appear to have been made at the trial. The information communicated by Dr. Kimball to the superintendent of the hospital was acquired by the former while attending the patient, and was

[1] Kelly *v.* Levy, 29 St. Rep., 659; 8 Supp., 849.
[2] Smart *v.* Kansas City (Mo.), 105 S. W., 709.

necessary to enable him to prescribe or act for him. Dr. Kimball would not have been allowed to make such disclosure, and the statutory restriction upon him could not be evaded by introducing in evidence testimony of a third party as to what the doctor said about the case."[1]

A case involving a very similar question, where a certificate signed by a physician, setting forth, among other things, the cause of death, required by an ordinance as a condition of a permit for the removal of a body, was held privileged in an action against an insurance company notwithstanding that the ordinance permitted the certificate to be made by a relative, the court saying: "If signed by a physician, it contains matter relating to his patient which the physician is not allowed to disclose as a witness upon the trial, against the objection of his patient or one representing him. That a record of this character reciting privileged communications may be used in evidence against a party, where the testimony of the physician making it cannot be received, is a proposition so inconsistent with reason and natural rules of justice that we cannot give our consent thereto."[2]

(6) *Records of Health Board.*—Records of a board of health are incompetent to prove the cause of a person's death by the physician's certificate.[3]

(7) *Autopsy.*—A physician is not debarred from testifying as to an autopsy of the body of one who had not been a patient in his lifetime, attended by him after death.[4]

(8) *Communications Made for Unlawful Purpose.*—The privilege has no application to communications

[1] Price *v.* Life Ins. Co., 90 Minn., 264; 95 N. W., 1118.
[2] Sovereign Camp W. W. *v.* Grandon, 64 Nebr., 39; 89 N. W., 448.
[3] Davis *v.* Supreme Lodge, 165 N. Y., 159; 58 N. E., 891.
[4] Harrison *v.* Sutter St. Ry. Co., 116 Cal., 156.

made for an unlawful purpose, having for their object the commission of crime.[1] Thus communications from one physician to another, made to secure the aid of the latter, in the commission of an abortion, are not privileged.[2] In the absence of any showing to the contrary the presumption must be indulged that the communication was for a lawful purpose.[3]

(*d*) **Who May Claim Privilege.**—The privilege may be invoked by the patient or the personal representatives of the deceased patient,[4] or by the assignee of a beneficiary in a life insurance policy.[5]

(*e*) **Waiver.**—(1) *In General.*—The rule prohibiting physicians from disclosing information obtained in attending patients is for the benefit of the patient and not the physician, and continues in force indefinitely and can only be waived by the patient,[6] and neither the death of the patient nor that of the physician terminate it. The waiver of the seal of secrecy from professional information is not contrary to public policy,[7] and is not dependent upon any statute expressly allowing it.[8]

(2) *Who May Waive Privilege.*—The privilege may be waived by the patient,[9] by his attorney,[10] personal

[1] State *v.* Kidd, 89 Iowa, 56.
[2] State *v.* Smith, 99 Iowa, 26.
[3] Guptill *v.* Verback, 58 Iowa, 98.
[4] Heuston *v.* Simpson, 115 Ind., 62.
[5] Briesenmeister *v.* Supreme Lodge, 81 Mich., 525.
[6] Storrs *v.* Scougale, 48 Mich., 387.
[7] Dougherty *v.* Metropolitan Life Ins. Co., 87 Hun., 15.
[8] Kenyon *v.* Mondovi, 98 Wis., 50.
[9] *California*—Lissak *v.* Crocker Co., 119 Cal., 442. *Indiana*—Morris *v.* Morris, 119 Ind., 341; Penn. Mut. Ins. Co. *v.* Wiler, 100 Ind., 92. *Iowa*—Shuman *v.* Supreme Lodge, 110 Ia., 480. *Michigan*—Briesenmeister *v.* Supreme Lodge, 81 Mich., 525. *Missouri*—Cramer *v.* Hurt, 154 Mo., 112; Davenport *v.* Hannibal, 108 Mo., 471. *Montana*—Territory *v.* Corbett, 3 Mont., 50. *New York*—Morris *v.* N. Y., etc., R. Co., 148 N. Y., 88. *Wisconsin*—In re Bruendl, 102 Wis., 45.
[10] Alberti *v.* New York, etc., Ry. Co., 118 N. Y., 77.

representative,[1] by the beneficiary in policy of life insurance,[2] or by his natural guardian.[3]

(3) *How Waiver Effected.*—The privilege may be waived by the patient testifying to the privileged matter himself,[4] or by calling the physician as a witness.[5]

Testimony on behalf of the patient, in an action brought by himself against his physician, operates as a waiver of his privilege, both as to the physician himself and others called in consultation with him; but not as to physicians independently employed, unless, it may be, the patient testifies as to his communications to the latter. But the bringing of a suit by a husband for malpractice upon his wife, or the giving of testimony by the wife in such suit, will not of itself so operate. However, the physician may be permitted to testify in such an action if the necessities of justice require.

Thus it has been held in an action brought by a husband for alleged malpractice upon his wife, in which the plaintiff, his wife, and his wife's mother testified as to all that was done by the defendant at the time the surgical operation was performed. A physician who was in attendance as a consulting surgeon might testify as to what occurred, the court saying: "The testimony given by the witness of the (patient) broke the seal of privacy, and gave publicity to the whole matter. The patient waived the statutory rule. The course pursued laid the occurrence open to investigation. Nothing was privileged, since

[1] Morris *v.* Morris, 119 Ind., 341; Fraser *v.* Jennison, 42 Mich., 206; Holcomb *v.* Harris, 166 N. Y., 257.

[2] Penn. Mut. Life Ins. Co. *v.* Wiler, 100 Ind., 92.

[3] State *v.* Depoister, 21 Nev., 107; Corey *v.* Bolton, 31 Misc. (N. Y.), 138

[4] Marx *v.* Manhattan R. Co., 56 Hun., 575.

[5] Lissak *v.* Crocker Co., 119 Cal., 442; Holcomb *v.* Harris, 166 N. Y., 257.

all was published. The statute was not meant to apply to such a case as this nor is it within the letter or the spirit of the law. If a patient makes public in a court of justice the occurrence of the sick room for the purpose of obtaining judgment for damages against his physician, he cannot shut out the physician himself, nor any other who was present at the time covered by the testimony. When the patient voluntarily publishes the occurrence, he cannot be heard to assert that the confidence which the statute intended to maintain inviolate continues to exist. By his voluntary act he breaks down the barriers, and the professional duty of secrecy ceases. It would be monstrous if the patient himself might detail all that occurred, and yet compel the physician to remain silent. The principle is the same whether the physician called is a consulting physician, or is the defendant. The opening of the matter to investigation removed the obligation of secrecy as to all, not merely as to one. When the obligation to silence is broken, it is broken for the defendant as well as for the plaintiff. As to all witnesses of the transaction it is fully opened to investigation, if opened at all, by the party having a right to keep it closed. A patient cannot elect what witnesses shall be heard and what shall not, for if once investigation legitimately begins it continues to the end. A patient may enforce secrecy if he chooses, but where he himself removes the obligation he cannot avail himself of the statute to exclude witnesses to the occurrence."[1]

[1] Lane *v.* Boicourt, 128 Ind., 420; 27 N. E., 1111.

CHAPTER X

RIGHT TO PROTECT PROFESSIONAL REPUTATION

1. IN GENERAL

It is libelous to impute to a member of the medical profession that he does not possess the technical knowledge necessary for the proper practice of such profession, or that he has been guilty of professional misconduct. If the words do not touch the personal character or professional conduct of the individual, they are not defamatory of him, and no action lies. Any words imputing to any person engaged in the medical profession, misconduct or incapacity in the discharge of his professional duties, are actionable without proof of special damages.[1]

2. AGAINST IMPUTATION OF GENERAL INCOMPETENCY

(*a*) **In General.**—It is generally held actionable to impute general incompetency to a physician.[2] Thus it is actionable to say: "Many have perished from her want of skill,"[3] and, "It is a world of blood he has to answer for in this town; through his ignorance he did kill a woman and two children at Southampton; he did kill John Prior at Petersfield."[4] So, too, a state-

[1] Camp *v.* Martin, 23 Conn., 86; Jones *v.* Driver, 22 Ind., 184; Craig *v.* Brown, 5 Black, 44; Gan *v.* Selden, 6 Barb. (N. Y.), 416.

[2] Swift *v.* Dickerman, 31 Conn., 285.

[3] Cruikshank *v.* Gordon, 48 Hun., 308; affirmed, 118 N. Y., 178.

[4] Tutty *v.* Alewin, 11 Mod. Rep., 283.

ment: "Look at those you profess to cure, you killed; they are in their graves," is actionable.[1] Likewise, it is actionable to charge a physician with having killed "six children in one year."[2] It has been held that an article in a Polish newspaper concerning a physician largely patronized by Poles among whom the paper circulates, is libelous upon its face where it refers to his profession and business, calls him a blockhead or fool, and appeals to the Poles not to trust themselves or their families to his professional care when he so hated them that he would not help them if he could.[3] But it is not actionable to state of a physician that "he is a two-penny bleeder;"[4] neither is it actionable to state of an old school physician that he has met homeopathists in consultation.[5] It is not actionable for an apothecary merely to decline, on one or two occasions, to fill his prescriptions for reasons not at all impugning the physician's capacity;[6] but an apothecary is liable in damages to a physician where, without the slightest cause, he indulges in public expressions tending to create the impression of the physician's incompetency, as for instance that his diploma is not worth a straw.[7]

A preamble to an order of a village board of health in regard to the treatment of obstetrical cases, which states that the reason for making the order is that the board has become satisfied that a number of recent deaths in the village have resulted from the carelessness and negligence of the physician attending the patients in childbirth soon after attending and

[1] De Pew *v.* Robinson, 95 Ind., 109.
[2] Carroll *v.* White, 33 Barb., 615.
[3] King *v.* Pitass, 162 N. Y., 154.
[4] Foster *v.* Small, 3 Whart., 138.
[5] Clay *v.* Roberts, 9 Jur., N. S., 580.
[6] Tarleton *v.* Lagarde, 46 La. Ann., 1368; 16 So., 180.
[7] Ibid.

handling other patients affected by blood poison and other infectious diseases, and that from the same cause others in the village have barely escaped death, is libelous per se.[1]

It has been held that a petition circulated by persons who describe themselves as reputable physicians and dentists occupying offices in a building and reciting that, endeavoring to uphold the honor and dignity of their profession and desiring to encourage only the best and most desirable tenants for the building, they are emphatically opposed to the rental of offices to osteopaths, criminal practitioners, advertising specialists, patent medicine fakers, quacks, charlatans, and other fraudulent concerns, is a libel upon an osteopath having an office in the building.[2]

A medical society which acts without jurisdiction is liable for a libel if it spreads upon its minutes a report expelling a member for alleged incompetency in his profession.[3] It is not libelous for a newspaper to publish an article which states in substance that the body of a farmer who apparently had been frozen to death had been found in the highway; that it had been taken charge of by plaintiff, as coroner, who empaneled a jury and was proceeding with an inquest when a physician, on making a careful examination, pronounced the man alive, and after about twenty-four hours' labor, restored him to consciousness, no mention being made in the article that the coroner was a physician.[4]

It is competent for a jury to find that words spoken by a clergyman to his congregation, to the effect that a certain physician had been excommunicated

[1] Mauk *v.* Brundage, 68 Ohio St., 89, 67 N. E., 152.
[2] Lathrop *v.* Sunberg, 55 Wash., 144, 104 Pac., 176.
[3] Fawcett *v.* Charles, 13 Wend., 473.
[4] Purdy *v.* The Rochester Printing Co., 96 N. Y., 37.

and should be no longer employed by them, were spoken maliciously and for the purpose of injuring the physician in his business.[1]

(*b*) **Charging a Physician with being no Scholar.**—The old rule that it is libelous to charge a physician with being no scholar is now disapproved.[2]

(*c*) **Ostentatious Puffing.**—Ostentatious puffing likely to subject a physician to ridicule has been assumed to be actionable.[3]

(*d*) **Calling a Physician a Quack.**—It is actionable to call a physician a quack;[4] or to say, "Thou art a quack salver;"[5] also to say he is an empiric and mountebank and a base fellow.[6] It cannot be slander to say that a person professing to be a physician is a quack if he has no diploma to entitle him to his degree.[7] When the physician is not entitled to practise medicine, he cannot recover damages for the utterance concerning him, "he is no doctor, nothing but a traveling quack, knows nothing about medicine, and but little about anything else.[8] Likewise, one having no right to practise medicine cannot recover damages from one who states that he is a quack and impostor and has not the slightest title to such honor as to be called a doctor.[9]

(*e*) **Charging a Physician with Drunkenness.**—To state that a physician "is so steady drunk that he cannot get business any more" is not actionable.[10]

[1] Morasse *v.* Brochu, 151 Mass., 567; 25 N. E., 74.
[2] Foster *v.* Small, 3 Whart., 138.
[3] Sullings *v.* Shakespeare, 46 Mich., 408.
[4] White *v.* Carroll, 42 N. Y., 161.
[5] Rolle, Abr., 54.
[6] Goddart *v.* Haselfoot, 1 Rolle. Abr., 54.
[7] Moises *v.* Thornton, 8 T. R., 303.
[8] Hargan *v.* Purdy, 14 Ky. L. Rep., 383.
[9] Collins *v.* Carnegie, 1 Ad. & El., 695.
[10] Anonymous, 1 Ohio, 83.

To say: "Thou art a drunken fool and an ass," has been held actionable.[1]

(*f*) **Charging a Physician with Adultery.**—This does not affect him in his profession so as to be actionable in itself.[2] But a charge of incontinence in his professional relations may be actionable.[3] So to charge a physician with incontinence, by which he looses his business, is actionable.[4] In Rhode Island the supreme court seems to have assumed that it was actionable to state that the physician had been caught in the act of adultery with one of his patients, by reason of which his practice fell off.[5]

(*g*) **Imputing General Incompetency to Midwife.**—To say of a midwife that she is an ignorant woman and hath small practice, and is very unfortunate in her way, there are few but are sick or die under her care, is actionable.[6] So to state that a midwife cannot do her work without the help of others is actionable.[7] To state: "Thou art no midwife but a nurse, and if I had not pulled thee from Mrs. J. S., thou hadst killed her and her child," is actionable.[8] To say: "Many have perished for her want of skill" is actionable.[9]

3. AGAINST IMPUTATION OF INCOMPETENCY IN PARTICULAR CASE

(*a*) **In General.**—A physician is only required to possess the ordinary knowledge and skill of his profession. He may possess them and much more, and

[1] Cawdry *v.* Highley, Cro. Car., 270.
[2] Ayre *v.* Craver, 2 Ad. & El., 2.
[3] MacLean *v.* Scripps, 52 Mich., 214.
[4] Dixon *v.* Smith, 5 Hurlet & N., 450.
[5] Rice *v.* Cottrel, 5 R. I., 340.
[6] Wharton *v.* Brook, 1 Vent., 21.
[7] Gyles *v.* Bishop, Freem., 278.
[8] Whitehead *v.* Founer, Freem., 277.
[9] Flower's Case, Cro. Car., 211.

yet be unable to accurately diagnosticate every disease presented, or always foretell the exact power and effect of medicine or treatment prescribed; but such deficiencies are incidents to human imperfections. So long, therefore, as the words employed in stating the conduct of a physician in a particular case only impute to him such ignorance or want of skill as is compatible with the ordinary or general knowledge and skill in the same profession, they are not actionable in themselves. But where the words so employed taken together are such as fairly impute to him gross ignorance and unskilfulness in such matters as men of ordinary knowledge and skill in the profession should know and do, then they necessarily tend to bring such physicians into public hatred, ridicule, or professional disrepute, and hence are actionable.[1]

A false report concerning a physician, although confined to his conduct in a particular case, and although it imputed to him no general professional incompetence, might nevertheless imply such gross ignorance or such gross and reckless or inhuman disregard for the health or life of his patient in that particular instance as necessarily to injure his professional reputation and cause him pecuniary injury. Thus a charge of allowing the decomposing body of a dead infant to remain for several days in the room with its sick mother is actionable.[2]

However, words spoken of a physician in reference to a particular case only may be so qualified by the fact that the most eminent physicians are liable to make mistakes, that unless they have an import and meaning, which in effect reaches beyond the particular

[1] Ganvrean *v.* Superior Publishing Co., 62 Wis., 403; 22 N. W. Rep., 726; Bradley *v.* Cramer, 59 Wis., 312, 313; 18 N. W. Rep., 268.

[2] Pratt *v.* Pioneer Press Co., 35 Minn., 251.

case and its treatment and goes to affect the doctor's professional character, learning, or skill, the law implies no damages as the consequence, and special damages are necessary to support the action.[1]

As was said by the court in a Mississippi case: "To charge a professional man with negligence or unskilfulness in the management or treatment of a particular case is no more than to impute to him the mistakes and errors incident to fallible human nature, and as no man can rightfully claim infallibility, the imputation of the contrary can work no legal damage or injury to him however much it may wound his vanity or offend his sensibility."[2] Thus it is not actionable per se to say that a doctor amputated an arm "to get his name up," or "to get the fee," or "that he acted on the advice of another doctor," or "that he might better have taken off the other arm."[3]

(*b*) **Charging a Physician with Killing Patient.**—It is actionable to say that a physician killed a patient for lack of skill;[4] and that "he has killed the child by giving it too much calomel."[5] Likewise it is actionable to say of a surgeon: "He killed J. S.;"[6] and it has been held actionable to say of a physician: "He killed my child; it was the saline injection that did it."[7] It is actionable to say of a physician: "Doctor Secor killed my children. He gave them teaspoonful doses of calomel, and they died; they died right off, the same day."[8] To say of a physician that the bitters he gave a patient were the cause of his death,

[1] Lynde *v.* Johnson, 39 Hun., 12.
[2] Rodgers *v.* Kline, 56 Miss., 808.
[3] Lynde *v.* Johnson, 39 Hun., 12.
[4] Watson *v.* Vanderlash, Het., 71.
[5] Johnson *v.* Robertson, 8 Port. (Ala.), 486.
[6] Watson *v.* Vanderlash, Hetley's Rep., 69.
[7] Edsall *v.* Russell, 43 Eng. Com. Law, 560.
[8] Secor *v.* Harris, 18 Barb., 425.

that there was poison enough in them to have killed ten men, is actionable.[1] To charge a physician with causing the death of a person, by administering poison in medicine, is slanderous.[2]

(*c*) **Charging a Physician with Lack of Skill.**—A charge of inability to recognize diphtheria as other physicians would is actionable.[3]

(*d*) **Charging a Physician with Unprofessional Conduct.**—To say that a physician's treatment of a particular case was rascally is not actionable per se.[4] But it is actionable to say: "He poisoned the wound of his patient for gain or money."[5]

4. NECESSITY OF COMPLAINING PHYSICIAN BEING LICENSED

A person must be lawfully authorized to practice the profession of medicine in order to maintain an action for libel or slander against one who charges him with misconduct or incapacity in the discharge of his professional duties.[6] It is not slanderous to say of a person professing to be a physician, that he is a quack, when he has no diploma.[7] If a physician brings an action for the speaking of words which are disgraceful to him in his profession, he must aver, in his complaint, that he was a practising physician at the time, when, etc., and that the words were spoken of and concerning him in his profession.[8]

[1] Jones *v.* Diver, 22 Ind., 184.
[2] Ibid.
[3] Ganvrean *v.* Superior Pub. Co., 62 Wis., 403.
[4] Camp *v.* Martin, 23 Conn., 86.
[5] 1 And. R., 268.
[6] Hargan *v.* Purdy, 14 Ky. Law Rep., 384; March *v.* Davidson, 9 Paige (N. Y.), 580.
[7] Moises *v.* Thornton, 8 F. R., 303.
[8] Carroll *v.* White, 33 Barb. (N. Y.), 615.

CHAPTER XI

VALIDITY OF CONTRACT RESTRICTING EXERCISE OF PROFESSION

COVENANTS in general restraint of trade, ancillary to the sale of a medical profession and the good-will thereof, are generally held violative of public policy, either because, upon the facts, a general restriction is more extensive than the protection of the covenantee requires, or because the interests of the State will not permit of a general restriction.[1] However, such covenants by physicians are generally sustained where the restraint is partial and reasonable in its extent as where the agreement is not to practise their profession in a certain city, town, or village.

In many cases, agreements by physicians, ancillary to the sale of their practice and good-will, not to practise their profession in a certain city, town, or village, have been sustained,[2] or where it covers a county.[3]

Agreements by physicians have also been sustained where the agreement was not to practise at a certain

[1] Rakestraw *v.* Lamer, 104 Ga., 188; Mandeville *v.* Harman, 42 N. J. Eg., 185.

[2] McCarry *v.* Gibson, 108 Ala., 451; Webster *v.* Williams, 62 Ark., 101 (city and vicinity); Martin *v.* Murphy, 129 Ind., 464; Beatty *v.* Coble, 142 Ind., 329; Cole *v.* Edwards, 93 Iowa, 477; Hill *v.* Cudgell, 9 Ky. L. Rep., 436; Gilman *v.* Dwight, 13 Gray, 356; Mott *v.* Mott, 11 Barb., 127; Hauser *v.* Harding, 126 N. C., 295 (town and surrounding territory); French *v.* Parker, 16 R. I., 219.

[3] Holbrook *v.* Waters, 9 How. Pr., 335; Gordon *v.* Mansfield, 84 Mo. App., 367.

place or a certain distance therefrom.[1] An agreement by a physician not to resettle at a certain place will prevent him again residing there to practise his profession, but it will not prevent him from residing in that locality and practising at such place.[2]

Specific Enforcement of Covenants not to Practise.—On the sale of his practice by a physician, a covenant or agreement on his part not to carry on or practise his profession within a reasonable distance of a particular place is valid, and will be enforced by injunction in favor of the purchaser of the practice.[3] Before a covenant not to practise "in the neighborhood" can be enforced, evidence must be given to show the extent of the practice sold to the complaining physician; and an injunction will not be granted to restrain an alleged breach of contract not to practise medicine where there is not sufficient evidence of such an agreement.

Where a physician has covenanted not to practise in a certain locality for a given period, and has bound himself thereto in a penal sum, and there is a violation of his agreement, there being an entire uncertainty in any calculation of damages from the breach of the contract, and the measure of damages being largely conjectural, equity will by injunction compel the specific performance of the contract.[4]

Where a physician has agreed not to "locate" within a given distance of a village, it is a violation

[1] Betts' Appeal, 10 W. N. C., 431 (five miles); Doty *v.* Martin, 32 Mich., 462; Smith *v.* Smith, 41 Wend., 468; Linn *v.* Sigsbee, 67 Ill., 75 (six miles); Ryan *v.* Hamilton, 205 Ill., 191 (eight miles); Pickett *v.* Green, 120 Ind., 584; Wolff *v.* Hirschfeld, 23 Tex. Civ. App., 670 (ten miles); Thompson *v.* Means, 11 Smedes & M., 604 (eleven miles); McClurg's Appeal, 58 Pa., 51 (twelve miles); Miller *v.* Elliott, 1 Ind., 484 (fifteen miles); Butler *v.* Burleson, 16 Vt., 176 (twenty miles).

[2] Haldeman *v.* Simonton, 55 Iowa, 144; 7 N. W., 493.

[3] McClurg's Appeal, 58 Pa., 51.

[4] Witkinson *v.* Colly, 164 Pa., 35.

of his covenant, which will be restrained by injunction, for him to open an office within said distance of the village, although the distance between his office and the purchaser is greater than that prescribed in the contract.[1] In such case, while prohibited from locating within the prescribed radius, the covenantor will not be prohibited from practising within such territory provided he does not locate therein.

A physician who has agreed not to practise within a given radius will be restrained by injunction from answering "special calls" made for his services by persons within said district. An injunction granted to restrain a physician from practising within prescribed limits in violation of his contract, has been afterward continued though the purchaser's note, given for the purchase money, had become due and unpaid.[2]

[1] Miller *v.* Keeler, 9 Pa. Co. Ct., 274.
[2] Gaul *v.* Hoffman, 5 Pa. Co. Ct., 355.

CHAPTER XII

WILLS

1. **In General.**—In considering the use of legal knowledge as applicable to medical practice, Sir William Blackstone has mentioned one of many instances: "It would be useful if the medical attendant were acquainted with at least the formal part of executing wills; in the moment of danger and distress, when all around the bed of death are confused with fear, or overwhelmed in affliction, the physician, probably a confidential friend, whose duty and habit ensures self-possession, may be the only person competent to advise. How many estates have been lost to an intended heir by an attestation informally signed because the witnesses were not in the presence of the testator?"

2. **"Will" Defined.**—The word "will," in the popular meaning of the term, is a disposition, made by a competent testator in the form prescribed by law, of property, over which he has legal power of disposition, which disposition is of such nature as to take effect at the death of the testator.

3. **Who May Make a Will.**—Generally speaking, the maker of a will must be of full age, of sound mind and memory, and not under any restraint. In some States full age is twenty-one years for both males and females; in other States it is eighteen years for females and twenty-one years for males. This as a general proposition excludes infants, insane persons, those suffering from delirium tremens or drunkenness at

the time of making the will, idiots, imbeciles, and monomaniacs, when the will is the offspring of such defects. In the States where modern statutes have given a married woman the same power to act as if she were unmarried, she has the same power to make a will that a man has.

4. **Publication.**—Publication is the act of making known in the presence of witnesses that the instrument to be executed is the last will and testament of the testator.[1] It is not necessary to constitute publication that the contents of the will be made known to the witnesses, nor is it material whether publication precedes or follows the signing of the will.[2]

5. **Necessity of Signing in Testator's Presence.**—The will must be attested and subscribed in the presence of the testator. The word "presence" implies that what is to be done in a person's presence must take place in physical proximity to such person. If the act is done in the same room with a person it is done in his presence prima facie. The person in whose presence the act is done must be able mentally to know what is being done.[3] Thus if he be faint and unable to know what is being done, or if he be asleep, in a stupor or dying, it is impossible for the act to be done in his presence.[4]

6. **Necessity of Subscription of Witnesses in Presence of Each Other.**—It is not necessary that subscription of the witnesses be made by them in the presence of each other, and at the same time if each sign in the presence of the testator.

[1] Hildreth *v.* Marshall, 51 N. J. Eg., 241; Gilbert *v.* Knox, 52 N. Y., 125.

[2] Ayres *v.* Ayres, 43 N. J. Eg., 565; Jackson *v.* Jackson, 39 N. Y., 153; Errickson *v.* Fields, 30 N. J. Eg., 634.

[3] Hill *v.* Barge, 12 Ala., 687; Hall *v.* Hall, 18 Ga., 40; Baldwin *v.* Baldwin, 81 Va.,-405.

[4] Walters *v.* Walters, 89 Va., 849.

7. **Sufficiency of Subscription.**—The witness is required by statute to "subscribe" the will. This subscription should be his full name, but such formality is not indispensable. The witness may sign his initials, or an assumed name, when done in good faith, or he may sign by his mark. A physician or any other person is not justified in putting his name as subscribing witness to a will unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied from his own knowledge of the state of testator's mental capacity that he is of sound and disposing mind and memory. By placing his name to the instrument the witness, in effect, certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead or is out of the jurisdiction of the court.[1]

8. **Capacity for Making a Will.**—What constitutes mental capacity to make a will is a subject on which the courts have differed. The American courts have held to the proposition that a person not perfectly sane might possess sufficient mental capacity to make a will.[2] In Indiana under the statute no one of "unsound mind" can make a will. Accordingly it is error to charge in a contest that in order to make a will a testator must have a sound mind; that is, "a mind wholly free from error."[3] *Testamentary capacity and contractural capacity* are so different in their nature that it is impossible to use one as a test for measuring the other, or to say that the existence of

[1] Scribner *v.* Crane, 2 Paige (N. Y.), 147.

[2] Bulger *v.* Ross, 98 Ala., 267; Couch *v.* Gentry, 113 Mo., 248; Schreiner *v.* Schreiner, 178 Pa., 57.

[3] Schreiner *v.* Schreiner, 178 Pa., 57.

one either proves or disproves the other's existence conclusively.[1]

The true test of testamentary capacity seems to be that the testator must have strength and clearness of mind and memory sufficient to know in general, without prompting, the nature and extent of the property of which he is about to dispose, the nature of the act which he is about to perform, and the names and identity of the persons who are the proper objects of his bounty, and his relation toward them.[2] The rule of testamentary capacity does not require a perfect memory.[3] The existence in the mind of a testator of mere delusions which do not affect either the natural or selected objects of his bounty is not inconsistent with testamentary capacity.[4]

Drunkenness.—Drunkenness, unless so complete as to destroy the victim's capacity to understand what he is doing, will not invalidate his will.

Old Age.—It is well settled that extreme old age of the testator alone does not render him incompetent to make a will; great age, bodily infirmity, and impaired mind do not invalidate a will; if the testator still retains sufficient mind to enable him to comprehend the property he has and the deserts of the persons to whom he wishes to devise or bequeath it. Mere physical weakness or disease, old age, eccentricities, blunted perceptions, weakening judgment, failing memory or mind are not necessarily inconsistent with testamentary capacity, but evidence of such facts

[1] Turner's Appeal, 72 Conn., 305; Brown *v.* Mitchell, 88 Tex., 350.

[2] Smith *v.* Henline, 174 Ill., 184; Hudson *v.* Hughan, 56 Kan., 152; Schmidt *v.* Schmidt, 47 Minn., 451; Couch *v.* Gentry, 113 Mo., 248; Franke *v.* Shipley, 22 Or., 104; Chappell *v.* Trent, 90 Va., 849.

[3] Henry *v.* Hall, 106 Ala., 84; Taylor *v.* Pegram, 151 Ill., 106; Sharp's Appeal, 134 Pa., 492.

[4] Church *v.* Crocker, 7 Ohio C. C., 327.

may be considered in determining whether testator has sufficient capacity.

9. **Undue Influence.**—Undue influence is "such as in some measure destroys the free agency of testator and prevents the exercise of that discretion which the law requires that the party should possess."[1] It consists in such influence, overpersuasion, coercion, or force as destroys the free agency and will power of testator.[2]

Appeals to the affections and emotions of testator, solicitation, and persuasion may be carried to such a degree as to overpower his mind, and in such case will amount to undue influence.[3] Flattery may be of such sort as will amount to undue influence. This is usually combined with deceit and solicitation.[4] Fraud and deceit may be made the means whereby testator's mind is overpowered, in which case they will amount to undue influence.[5] Undue influence need not necessarily have been exerted by a beneficiary under the will; but in order to avoid the will, it must be shown that the undue influence operated at the time that the will was made, and caused its execution.[6]

10. **Right of Testator to Cut off Child.**—In the majority of States at the present time there is no legal objection to a man making a will which cuts off all or any of his children from any participation in his estate, or which divides it very unequally among

[1] Johnston *v.* Armstrong, 97 Ala., 731; 12 So., 72.

[2] Riley *v.* Sherwood, 144 Mo., 354.

[3] Eastis *v.* Montgomery, 93 Ala., 293; 9 So., 311; Grove *v.* Spiker, 72 Md., 300; Thompson *v.* Ish, 99 Mo., 160.

[4] Orchardson *v.* Cofield, 171 Ill., 14.

[5] Coyhill *v.* Kennedy, 119 Ala., 641; 24 So., 459; Jones *v.* Simpson, 171 Mass., 474; Haines *v.* Hayden, 95 Mich., 332; Gordon *v.* Burris, 153 Mo., 223, 54 S. W., 546.

[6] Kaufman's Estate, 117 Cal., 288; Reichenbach *v.* Ruddach, 127 Pa., 564.

them; but in other States the law requires that some provision be made for every child or the will is void.

11. **Nuncupative Wills.**—Most statutes allowing nuncupative, or unwritten, wills agree that in order to make a valid will the testator must be of full age, of sound memory and mind, and not under any restraint; it must be made in the last sickness and can only relate to personal property; the testator must call upon the witnesses to the requisite number, and in the presence of the requisite number, to bear witness that the words spoken by him are his last will. Without this the will is invalid no matter how clear the testamentary intent.[1]

It is generally provided by statute that a nuncupative will must be reduced to writing and subscribed by the requisite number of competent witnesses within the time fixed by statute, which is generally a very short one. Omission to comply with this provision renders the will a nullity.[2] Even if reduced to writing within the time limit the will is avoided if not also subscribed by the required number of witnesses within the time fixed by statute.[3] In view of the necessities of the case it is held that the exact words used by the testator need not be reduced to writing. It is sufficient if their substance can be thus reduced.[4]

12. **Form of Will.**—Under the codes a will, with the exception of the nuncupative will, must be in writing. Verbal additions cannot alter a written will.[5] It is generally held, in the absence of special statutory

[1] Sampson *v.* Browning, 22 Ga., 293; Grossman's Estate, 175 Ill., 425; Biddle *v.* Biddle, 36 Md., 630.

[2] George *v.* Greer, 53 Miss., 495; Taylor's Appeal, 47 Pa., 31.

[3] Welling *v.* Owings, 9 Gill (Md.), 467.

[4] Rolles *v.* Harris, 34 O. S., 38.

[5] Knight *v.* Tripp, 121 Cal., 674; Smith *v.* Smith, 54 N. J. Eg., 1.

authority, that any material which can be used to write upon may be used.[1] As to material with which the writing is done, ink is, of course, the best, whether applied with a pen or a typewriter; but it may be written in lead pencil. A will written on a slate is so easy to alter that the courts will not recognize it.[2] The will may be written in any language, whether the testator is acquainted with that language or not.[3] However, the testator must know the nature of the act which he is performing; and the fact that the will is drawn up in a language foreign to the testator may be shown to prove that he did not execute the will *animo testandi*.[4]

The will should be signed at the end thereof by the testator or by someone signing his name in his presence, and by his express direction. The signature may be in ink or with a pencil, or with a stamp, or a seal.[5]

The signature may consist of a mark, but when signed by a mark, it must also be attested and subscribed in the presence of the maker by two or more competent witnesses, who either saw the maker sign it or heard him acknowledge that it was his will. A signature of the testator's name made by another out of his presence is not a valid signature.[6]

Form of Will.—In the name of the benevolent Father of all, amen: I, ———, of the——— of ———, county of ———, being about ——— years of age, and being of sound and disposing mind and memory, do make, publish, and declare this my last will and

[1] Rymes *v.* Clarkson, 1 Phill., 22.

[2] Temple *v.* Mead, 4 Vt., 535; Harris *v.* Pue, 39 Md., 535; Reed *v.* Woodward, 11 Phila. (Pa.), 541.

[3] Hoshauer *v.* Hoshauer, 26 Pa., 404; Walter's Will, 64 Wis., 487.

[4] Miltenberger *v.* Miltenberger, 78 Mo., 27.

[5] Word *v.* Whipps, 28 S. W., 151; Knox's Estate, 131 Pa., 220.

[6] Catlett *v.* Catlett, 55 Mo., 330.

testament, hereby making null and void all other last wills and testaments by me made heretofore:

First. My will is that all my just debts and funeral expenses be paid out of my estate as soon after my decease as shall be found convenient.

Second. I give, devise, and bequeath to ————

Third. I give, devise, and bequeath to ————

In testimony whereof I have set my hand to this, my last will and testament, at ————, this ———— day of———, in the year of our Lord one thousand nine hundred and twelve.

———— ————

Signature of testator.

The foregoing instrument was signed by the said ———— in our presence and by *him* published and declared as and for *his* last will and testament, and at *his* request, and in *his* presence, and in the presence of each other we hereunto subscribe our names as attesting witnesses at——— this———day of———, A.D. 1912.

——— ———, resides at ————

——— ———, resides at ————

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